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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM JAMES HOSTON,

Appellant,

vs.

THE J. R. WATKINS COMPANY, a corporation, aka WATKINS PRODUCTS, INC., a corporation,

Appellee.

NO. 17424

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

VAUGHN AND MORROW
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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM JAMES HOSTON, Appellant, vs. THE J. R. WATKINS COMPANY, a corporation, aka WATKINS PRODUCTS, INC., a corporation, Appellee.	No. 17424 APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

This is an appeal from a judgment for defendant appellee, THE J. R. WATKINS COMPANY, a corporation, entered by the United States District Court for the Southern District of California, Central Division, based upon the granting of a motion made by appellee for summary judgment.

SUMMARY OF MATERIAL FACTS

WILLIAM JAMES HOSTON filed a verified complaint for damages, accounting, and declaratory relief in the United States District Court for the Southern District of California, Central Division, on November 15, 1960. Said complaint alleged in sum and substance that appellant entered into an oral agreement with the appellee for an exclusive distributorship in an exclusive territory located in the County of Los Angeles, State of California, in an area commonly known as the San Fernando Valley.

Appellant further alleged in said complaint that he expended certain sums in order to comply with the requirements of appellee with reference to the establishment of the exclusive distributorship in said exclusive territory and that appellee breached the agreement with appellant. As a result of said breach of agreement, appellant was damaged in the respective sums set forth in the complaint. The oral agreement that appellant entered into with appellee was alleged to be as follows:

That appellant devote his entire time, labor and best effort to the promotion and sale of the line of products known as "Watkins Products" as a distributor of Watkins products at appellee's designated wholesale prices. Said contract further provided that plaintiff distribute the Watkins products in an area of Los Angeles County known as the San Fernando Valley, and so long as plaintiff was a distributor in said designated territory appellee would create no new or allow to exist any other distributor. Said contract also provided that appellant was to secure and maintain at appellant's expense a fully equipped and appointed office approved by appellee as to its location, type, equipment and appointments. Said office was to be of such caliber as to give the impression to the public of a highly successful business and which was attractive to the public and which would be a distinct credit to the appellee; that said office was to bear the name of the appellee

and in every manner convey the impression that appellee was doing business from its location. Said contract provided that appellant was to recruit and train a sales staff whose job was to sell at retail prices appellee's products to consumers from door to door, or on an individual basis. All of said training program, cost of recruiting and "plush" office, was according to said oral agreement to be at appellant's cost and expense, and appellant promised to hold appellee harmless with reference to any charge or liability connected therewith. Said agreement also provided that appellant was to refrain from selling, handling or distributing any products not distributed to appellant by appellee and that appellant was to handle exclusively merchandise distributed to appellant by appellee. That said agreement further provided that appellee would supply appellant sales quotas for designated periods of a week, month, quarter, and year, and that appellant was to maintain a dollar sales volume in accordance with said quota requirements. In return for appellant's promise of performance and performance as herein above set forth, said agreement provided that appellee sell its line of products to appellant at appellee's wholesale prices, less a discount of twenty-seven and one-half percent (27½%). Said agreement further provided that appellant was to furnish a bond by surety of Five Thousand Dollars ($5,000.00) and that said agreement was to exist for one year with option to renew on the part of appellant for a

year, on a year-to-year basis thereafter provided that appellant had satisfactorily performed by maintaining the prescribed office, recruiting and training the necessary personnel, and meeting the prescribed sales quota. Said agreement further provided that said option to renew could be terminated upon reasonable notice in writing. Said agreement further provided that a part of said oral agreement was to be reduced to writing upon the expressed understanding of the parties that said writing was for the purpose of providing a protection for appellee against appellant by a third party, so that as between appellee and said third party, the relationship of appellee and appellant would be that of vendor and purchaser, the appellee described as the vendor and the appellant as the purchaser, and said written agreement was to provide for the sale of appellee's products to appellant at appellee's wholesale prices was 27½% discount. That upon the termination of the vendor and purchaser relationship, that any merchandise in possession of the appellant could be returned to appellee and appellant would receive a credit for any amount due appellee by appellant. Said complaint further alleged that WILLIAM JAMES HOSTON was a resident of the County of Los Angeles, State of California, and appellee The J. R. WATKINS COMPANY, was a Delaware corporation and that its principle place of business was in Winona, Minnesota.

Said complaint further alleged that in performance of said oral agreement, appellant was to invest from $3,500.00

to $5,000.00 in the period of one year and that appellant would keep on hand the merchandise in excess of appellant's immediate need of not in excess of $5,000.00 in order to properly promote the sale of said Watkins products.

The complaint further alleged that appellant performed said oral agreement in each and every particular and did invest the sum of $4,380.00 in accordance with said oral agreement August 29, 1957, and December 27, 1958.

Said complaint further alleged that on August 29, 1958, appellee renewed appellant's option as provided for in said agreement, and appellant continued to perform as aforesaid until December 27, 1958, at which time and before the expiration of one year, the appellee without just or reasonable cause and without any prior notice did orally inform appellant that appellee would not deliver any more merchandise to appellant after said date; and demanded that appellant execute a resignation and also transfer his furniture, fixtures, and merchandise to a Cletus Reiter. Appellant refused to resign or make said transfer. On January 6, 1959, appellee sent a letter to appellant notifying appellant that the distributor agreement was terminated, effective January 9, 1959.

The complaint also alleged that appellant attempted to learn from appellee the reason for appellee's unreasonable conduct. Appellee refused and failed to state any reason for appellee's action. Appellee solicited

directly each sales person recruited and trained by appellant and by false and untrue representation that appellee had resigned from the distribution of Watkins products and had terminated said agreement causedsaid sales personnel to become the sales staff of said Cletus Reiter. Said complaint further set forth that appellant was unable to obtain any Watkins products and appellee appropriated to its own uses and retained unto itself, without compensating appellant, all the result of appellant's labor and work performed at the special instance and request of appellee, including appellant's promotional activity, appellant's sales staff of 200 persons, and the reputation and goodwill acquired by appellee through appellant's work and labor, and the investment in money as hereinabove set forth. Said complaint further alleged that appellant demanded that appellee furnish appellant with a statement of the items of merchandise by name and the wholesale purchase price of each item so that appellant would no whether or not appellee's claim of indebtedness to appellee in the sum of $2,151.27 by appellant was true and correct. The complaint alleged that appellee refused said request and to render an accounting of the items received and those which were not present among the merchandise turned over to appellee by appellant. The complaint further alleged that appellant denies that he owed the sum of $2,151.27 to appellee.

Appellee answered said complaint and denies the

existence of said oral agreement, the performance of said oral agreement by appellant, and alleged affirmatively in sum and substance that appellant and appellee executed a contract, Exhibit 'B', attached to appellee's answer providing for the sale to appellant by appellee of appellee's merchandise at wholesale prices less 27½%, that provided appellee was to furnish appellant all of appellee's goods reasonably required by appellant, provided that either party could terminate the agreement by giving notice thereof in writing, and that the relationship between the parties was that of vendor and purchaser and this Exhibit 'B' constituted the only contract between the parties.

Appellee moved the Court for a summary judgment and in support its motion filed its affidavit made by Alfred J. Smallberg, attorney at law for appellee, which affidavit insofar as it refers to the matters alleged in the complaint and denies in the answer, refers only to the matters with which appellant sought an accounting of and the merchandise returned to appellee after its termination of the distributorship agreement. It further in this regard states that appellant admitted in his deposition the correctness of this alleged account.

The depositions of appellant WILLIAM JAMES HOSTON, and JOHN FRANCIS THRUNE, an agent for defendant in control of all of appellee's California operation. LAWRENCE LYTLE WATKINS another agent for appellee and the district

supervisor envolved these depositions were taken and were before the Court at the time it granted appellee's motion for summary judgment. In response to appellee's motion for summary judgment, appellant submitted its pre-trial statement and memorandum of points and authorities and orally opposed said motion.

The Court made findings of fact that in substance were based upon appellee's affidavit, the depositions, and the pleadings, that the only agreement between the parties was Exhibit 'B' to the answer of appellee.

ARGUMENT

POINT I

THE COURT ERRED IN SUSTAINING APPELLEE'S MOTION FOR SUMMARY JUDGMENT.

In considering a motion for summary judgment, the pleadings are to be liberally construed in favor of the party opposing the motion and the Court must take the view most favorable to the party opposing the motion, giving that party the benefit of all reasonable inferences that may be drawn from the evidence.

McHenry v. Ford Motor Co., CA Mich., 1959, 269 F 2d 18

On a motion for summary judgment, the pleadings of the opposing party must be taken as true, unless by the admissions, deposition or other material introduced, it appears beyond controversy otherwise.

Hurn vs. St. Paul Mercury Indemn. Co., 1959,

CA La. 262 F 2d 526

All doubt as to whether a motion for summary judgment should be granted should be resolved against the movant.

Booth vs. Barber Transp. Co., CA Neb. 1958,

256 F 2d 927

Snyder vs. Hillegeist, CA 1957, 246 F 2d 649,

106 U.S. App. D.C. 360

A court is not at liberty to engage in a creditability evaluation for the purposes of a summary judgment.

Johnson Farm Equipment Co. vs. Cook, 1956

CA 230 F 2d 119

Coe vs. Riley, CCA Fla 1947, 160 F 2d 538

In Gerard vs. Gill, C.A. N.C., 1958, 261 F 2d 695, it was held that conflicts and ambiguities are not to be resolved on motions for summary judgments and neither is the trial Court at liberty to choose between conflicting inferences. The function of a motion for summary judgment is not to permit the Court to decide issues of fact but solely to determine whether there is an issue of fact to be tried.

Aetna Ins. Co. v. Cooper Weels & Co., 1956,

C.A. Mich, 234 F 2d 342

Coylar vs. Virden, 1955, C.A. Mo., 217 F 2d 739

A summary judgment should not be used as a substitute for trial on facts and law, especially where the parties

are entitled to trial by jury, and the mere fact that the trial Judge believes that the plaintiff cannot win his lawsuit before a jury does not endow him with authority to take the place of a jury and to decide lengthy contested issues of fact.

Cox vs. English-American Underwriters, CA (Cal.) 1957, 245 F 2d 330.

The law of California should determine whether a triable issue of fact exist under the pleadings and depositions.

Kruger vs. Ownership Corp, 1959, C.A. N.J., 270 F 2d 265

The presence of a single genuine issue as to a material prejudices disposition of a case by summary judgment and it may not be rendered.

Cee Bee Chemical Co. vs. Delco Chemicals, Inc., 1959, 263 F 2d 150.

Hoffritz v. U. S., 1956, CA Cal. 240 F 2d 109

A substantial dispute of a material fact is the test required to be used in determining the propriety of granting a summary judgment.

Guerriro vs. American-Hawaii, 1955, SS Co. CA. Cal., 222 F 2d 236.

The decision in the case at bar is in violation of each of the precepts outlined above and ignores directly in the rule layed down for the Court itself in the case of

Williams vs. Minnesota Min. & Mfg. Co., 1953, D.C., Cal. 14 FRD 1 when the Court said that where inconsistency between affidavits for support of summary judgment and the complaint raises issues of fact, the Federal District Court may not resolve the conflict on a motion for summary judgment.

POINT II

THE AFFIDAVIT OF APPELLEE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT DID NOT COMPLY WITH RULE 56, FEDERAL RULES.

The affidavit filed by appellee is wholly insufficient because it does not comply with Rule 56 (e) in that it is not made by a person who has personal knowledge of the facts alleged in the complaint and denied in the answer; and it is of the type of affidavit which the Court held wholly insufficient in Cornecchio vs. Conegilio, 1947, NC. N.Y. 7 FRD 749, where the Court said that an affidavit by an attorney ordinarily insufficient because he has no personal knowledge of the facts. Essentially, the affidavit of Smallberg is the same as that which was striken in Porter vs. American Tobbacco, 1946 DC. (N.Y.), 7 FRD 106, where the Court held that while it was proper to summarize in an affidavit the facts, it was improper in an affidavit to make an argument. Essentially, this is what Smallberg's affidavit is: an argument.

POINT III

THE COMPLAINT AND THE ANSWER TENDER SIX ISSUES OF FACT.

The issues of fact tendered by the complaint and the denial of the answer are as follows:

1) Whether there existed an oral contract as set forth in the complaint or whether the document marked Exhibit "B" attached to appellee's answer and counterclaim is the only agreement between the parties?

2) If the oral agreement set forth in complainant's complaint is valid and subsisting as between the parties, did defendant breach said agreement by their conduct as is alleged in the complaint?

3) If Exhibit "B" attached to appelle's answer is the only agreement between appellant and appellee, since Exhibit "B" was dated August 29, 1957, and renewed in August of 1958? Did appellee have the right under said agreement to refuse to honor that agreement as of December, 1958, and to give notice of termination orally in December and by writing in January, 1959?

4) Is appellant entitled to a statement from appellee setting forth the names of the items claimed to be unpaid for and the wholesale purchase price of each of said items.

5) Is appellant indebted to appellee in the sum of $2,151.27?

The law of California with respect to contracts of the nature and extend here involved is that: first where one party claims that the agreement was oral and then reduced to writing, as appellee claims, a determination must be made with respect to whether or not the writing is in fact an intergrated agreement, and if it is an intergrated agreement, then 'parol evidence is admissable to show that the purported writing was sham or artifice, or that it is existent as a contract was dependent upon some condition not inconsistent with the terms thereof'. Parol evidence may be offered 'to show that the parties executed the contract for some extrinsic purpose such as sham or artifice or that it was intended for some purpose other than to set forth their respective rights and obligations.' Parol evidence may also be received 'to show extrinsic condition upon which the effectiveness of the writing depended'.

Parker vs. Meneley, 1951, 106 CA 2d 391, 235 P 2d 107

Code of Civil Procedure of the State of California, Section 1856, Section 1860, Section 1625.

The affidavit of Smallberg in support of motion for summary judgment does not touch upon any of these issues and the deposition of WILLIAM JAMES HOSTON shows his testimony

in full with reference to said oral agreement and the depositions of THURNE and WATKINS only go sufficiently as far to admit that oral conversation along the lines of appellant's oral agreement did take place.

In Aaron Ferer & Sons vs. Richfield Oil Corp, 1945 150 F 2d 12, the 9th Circuit held that where plaintiff files an affidavit denying a prior agreement between the parties and alleges that the pleaded agreement was the only one made and seeks a summary judgment thereon, and defendant files affidavits creat a genuine issue as to a material fact requiring the usual trial by witnesses subject to cross examination and the District Court should have denied a motion for summary judgment. That Aaron Ferrer & Sons Case is quite similar to the case at bar in that plaintiff's verified complaint is in fact insofar as it alleges facts, a sworn affidavit opposed by the verified denial of defendant, another sworn affidavit, which under said status creats a genuine issue of fact to be tried.

It appears from the findings of fact that the District Court of Appeals made a determination as a matter of law that in fact there was no oral agreement. While the Aaron & Sons Case, supra, dealt specifically with the question of reformation of an agreement, it is a kin to the case at bar because both of the cases involve the existence or non-existence of an oral agreement. In view of the law set forth in plaintiff's memorandum of points and authorities filed in the

District Court pursuant to Rule 9, Page 76 through 87 of Transcript of Record, there is no question that if plaintiff proves the allegations of his complaint, plaintiff is entitled to judgment.

The District Court in its findings of fact and conclusions of law made no findings whatever with reference to whether or not appellant was entitled to an accounting of the kind set forth as requested in the complaint. It made no finding with respect to whether or not the oral agreement as alleged in the complaint was in fact executed or not executed by appellant, it made no finding with respect to whether or not appellee had the right to terminate the agreement it found to exist after it had existed for six months, and the District Court made no finding with respect to whether or not Exhibit "B" attached to defendant's answer was or was not a valid enforceable contract. It is submitted that the District Court made no findings on these issues because it had no evidence before it on these issues except the allegation of fact in the complaint and the denial of defendant. This failure on the part of the District Court, itself, evidences the confusion with which the District Court approached the problems raised by the pleadings in this case.

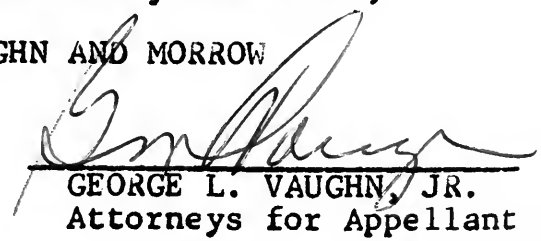
CONCLUSIONS

The judgment in favor of defendant based upon the granting of the motion for summary judgment should be

reversed. It is patent from the status of the record that the first issue tendered by the pleading is the existence or non-existence of an oral agreement; and even though the Court might hold that no agreement existed, there is still the issue of whether or not the defendant had a right to terminate his relationship with plaintiff completely after it had renewed its agreement. The cases set forth in appellant's memorandum of points and authorities reported in the transcript of record on appeal at Page 71 and incorporated herein by reference, clearly show that all of the issues in this case are ones of fact, except the issue with reference to the interpretation of Exhibit "B" to defendant's answer in determing whether it is in fact an enforceable agreement or whether it is simply an illusary writing.

Respectfully submitted,

VAUGHN AND MORROW

BY: 

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IN THE

United States Court of Appeals

For the Ninth Circuit

No. 17425

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 340, AFL-CIO,
Respondent

On Petition for Enforcement of an Order of the National Labor Relations Board

Brief for Respondent

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Respondent

On Petition for Enforcement of an Order of the National Labor Relations Board

Brief for Respondent

I.

STATEMENT OF THE CASE

This case is before the Court upon petition of the National Labor Relations Board, hereafter called the Board, to enforce its order (R. 38-42)[1] against respondent, here-

1. In accordance with the Board's brief (fn. 1), references herein to the printed record are designated "R", and the appearance of a semicolon in a series of references denotes a division between Board findings and the evidence relating thereto.

after called Local 340, issued under Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), hereafter called the Act. No question is presented as to the jurisdiction of this Court or the Board. The Board concluded that Local 340 had refused, in the operation of its hiring hall, to refer Jack L. Wood for employment to a particular job because he was a member of Local 800 of the International Brotherhood of Electrical Workers, and not a member of Local 340, affiliated with the same International. Local 340 readily conceded before the Board, as it does here, that it declined to refer Wood to the job which he requested, but denies that Wood's membership in a sister local was the reason therefor. The evidentiary facts relating to Local 340's operation of the hiring hall, and the handling of Wood's request for referral, may be summarized as follows:

A. Local 340's Administration of the Hiring Hall.

Local 340 represents electricians in the Sacramento Valley area who work primarily in industrial, commercial and residential jobs (R. 6; 103). It is generally referred to as a "wireman's" local (R. 6; 103). Local 340 has a collective bargaining contract with the Sacramento Valley Chapter of the National Electrical Contractors Association, under which it is vested with the responsibility of operating an exclusive hiring hall for the recruitment of employees for the Association's members (R. 34; 44-50). The hiring provisions of the contract provide that the selection and referral of applicants shall be made "without discrimination against such applicants by reason of membership or non-membership in the union," and without regard to "any other aspect or obligation of union membership policies or requirements" (R. 46-47). Applicants for employment wishing to

use the facilities of the hiring hall may register in the highest of five separate group classifications for which they can qualify. The classifications are based upon such factors as experience, competency as determined by a written examination, length of residency within the area, and prior employment by an employer party to the contract (R. 6-7; 47-48). Referrals are made in accordance with registration seniority and by group priority (*ibid.*). An exception to the classification system may be made, however, "when the employer states bona fide requirements for special skills and abilities," in which case "the first applicant on the referral list possessing such skills and abilities" will be dispatched to the job (R. 7; 50). In the event that any registrant is dissatisfied with his treatment in the hiring hall, he is entitled to complain to an Appeals Committee, composed of two members representing the union and management, respectively, and a third public member, who during the events in this case was a Catholic priest (R. 8; 50, 139-140).

Local 340 has established several hiring halls within its jurisdiction, including Chico, California, which is involved in this case (R. 5; 45-56, 102-103). The rules for the operation of the Chico hiring hall are posted for inspection by the applicants (R. 128). These rules require applicants to register in the appropriate book, or classification, and thereafter to "verify," their availability for work by initialing a dispatch book, noting the dates upon which they report to the hall (R. 17-18; 89-90, 94-95). The hiring hall at Chico is administered by Stanley Hamilton, Business Representative of Local 340, who is under the general supervision of William J. Campbell, Business Manager of Local 340 (R. 8; 102, 116).

B. The Experience of Applicant Jack L. Wood in Local 340's Hiring Hall.

1. WOOD'S USE OF THE HIRING HALL PRIOR TO THE EVENTS IN THIS CASE.

Jack L. Wood is a member of Local 800, International Brotherhood of Electrical Workers, having jurisdiction over railroad electricians, but on various occasions Wood has utilized the facilities of Local 340's hiring hall (R. 9-10, 34; 69). Thus, in 1957 Wood obtained a job in Oroville with Walsh Construction Company, and was cleared for work by Local 340 (R. 10; 70). Walsh Construction Company is engaged, *inter alia,* in the drilling and construction of tunnels and has a repair and maintenance shop in Oroville where work is performed on its mine locomotives and other heavy equipment using heavy-duty DC batteries (R. 9; 54). The Company is a member of the National Electrical Contractors Association, and utilizes the Chico hiring hall for recruitment of its employees (R. 34; 57).

In December, 1958, Wood was laid off by Walsh Construction Company, and reported to Local 340's hiring hall where he registered in the "travelers' book" as available for employment (R. 10; 71-72). In his effort to obtain employment, Wood talked with Business Manager Joe Campbell at about the same time, and was told that his membership in Local 800 was "not so good" because there were no "wiremen in 800," and that he "shouldn't work in a construction local" (R. 35; 99-100). Later in the month, however, Wood was dispatched from the hall to a job with Wismer and Becker Electric Company, where he worked for approximately a year (R. 11; 72). During this employment Wood applied for membership in Local 340, but he was not permitted to transfer his membership from Local 800 at that time (R. 11; 72-73). In December, 1959, Wood quit his job with Wismer and Becker and once again, on December 23, reported to the hiring hall in Chico (R. 15-16; 75-76).

2. WOOD'S SUBSEQUENT ATTEMPTS TO OBTAIN EMPLOYMENT WITH WALSH CONSTRUCTION COMPANY, AND LOCAL 340's REFUSAL TO CLEAR HIM FOR THAT EMPLOYMENT.

When Wood appeared at the Chico hiring hall he requested to register in the group one book, but was told by Business Representative Stanley Hamilton that he was eligible only for group three since he had not passed an examination (R. 16, 34; 76). Wood informed Hamilton at this time that he was a member of Local 800 and that he had once worked for Walsh Construction Company (R. 16; 76). Although the hiring hall rules, which were posted for inspection by applicants, required continued verification by applicants of this availability, Wood did not comply with this rule following his registration until about February 5, 1960, and was not dispatched for jobs during this period (R. 17; 89, 95, 101, 128). Also during this period Wood took an examination to qualify him for a higher referral priority (R. 17; 78). On February 5, 1960, however, Hamilton told Wood that he had not been eligible to take the examination, and further informed him that his registration in group three was a mistake, and that he must register in the group four book (R. 18; 80, 93-94, 104-105). Hamilton had erroneously placed Wood in group three because Wood had originally stated upon registering that he was a journeyman wireman, an inaccuracy which apparently came to light when Wood took the examination (R. 104-105).

Following February 5, 1960, Wood regularly verified his availability for work, and also noted on the dispatch book that he had special skills in lead burning and DC battery repair (R. 18; 81-82, 95). On February 12, 1960, another applicant, Merridith Ward, was dispatched to Walsh Construction Company for a job requiring such skills, and Wood asked Hamilton why he had not been sent

to the job instead of Ward (R. 18; 52, 94). Hamilton replied that Wood had not verified his availability for work until after Ward had registered in group four on January 22, 1960 (R. 18; 51, 94).

In the meantime, on about January 15, 1960, Rudolph Shulz, electrical superintendent for Walsh Construction Company had notified Hamilton that Walsh needed a man for the Oroville shop, and requested that Ward, Shulz's son-in-law, be dispatched to the job (R. 12; 54, 58, 59). At that time there was only one employee at Walsh's Oroville shop, Shulz's son, whom Shulz had asked to be cleared by Local 340, and had been put to work in a non-electrician classification when clearance was denied on the ground that Shulz's son had "no classification whatever" (R. 12; 57-58, 118). The first applicant referred by Hamilton for the Walsh job was Arnold Olds, on February 5, but Superintendent Shulz determined that Olds was not qualified and rejected him (R. 12-13; 52). Thereafter, as stated above, Ward was dispatched, and was accepted for employment by Shulz (R. 13; 52). Shulz later called the hiring hall for an additional man who was qualified to work on heavy DC batteries (R. 13; 62). Shulz had earlier mentioned Wood's name to Hamilton as qualified for the job, and repeated the request for Wood on subsequent calls (R. 13; 60, 112, 119). The first man dispatched to Walsh after Ward had been hired was an applicant named Wheeler, who had registered in group 1 on March 11 (R. 13; 52). Hamilton took him out to the job on March 18 (*ibid.*). Wood was aware that Wheeler was being referred to the Walsh job, and followed him when he reported to Shulz (R. 13, 19; 83). After Wheeler was hired by Shulz, Wood asked Shulz if another man was needed, but Shulz answered in the negative (*ibid.*).

About two weeks later Shulz called the hiring hall for another electrician qualified to work at the Oroville shop (R. 14; 62). Local 340's Business Manager Campbell and Business Representative Hamilton thereupon met with Shulz to discuss the continuing requests to the hiring hall for a specially skilled man (R. 14-15; 120-121). Campbell told Shulz that Local 340 was of the opinion that Shulz was attempting to obtain Wood out of order under the hiring procedure (*ibid.*). Shulz denied this, and Campbell assured him that the Union could furnish Walsh with other qualified applicants who had a higher priority (*ibid.*).

Thereafter, in April and May, two additional men were referred to Walsh from the hiring hall, but neither was accepted by Shulz (R. 14-15; 52, 63-64). Of the several men dispatched to the Walsh job, two were not members of Local 340, but held cards in sister wiremen's locals (R. 110, 113). Wood was never dispatched to the Walsh job (R. 15; 65). Hamilton, however, told Wood that the Sacramento railroad local had available jobs for referral, and also suggested that Wood might more easily obtain work through the Marysville hiring hall of Local 340 (R. 85, 114-115).

3. THE REASONS ADVANCED BY LOCAL 340 FOR NOT REFERRING WOOD TO THE WALSH JOB.

Business Manager Campbell testified at the hearing before the Trial Examiner that he had directed Hamilton that Wood should not be referred to the Walsh job (R. 119). Campbell's stated reason for issuing this instruction was that he had become convinced that Shulz's attempt to obtain Wood by name was not "a bona fide request for a special skill under [the] referral system," but rather that Shulz "was after the man" irrespective of his eligibility for referral (R. 126, 120). Campbell reached this conclusion in view of Shulz's continued attempts to obtain union

clearance for named individuals, including two members of his family (*supra,* p. 6), and also because of his conviction that there was not sufficient work at the Oroville shop requiring the special skills for the number of men Shulz had requested (R. 118-126, 155-156). Campbell also felt that Shulz had rejected some of the applicants dispatched from the hiring hall in spite of the fact that they had experience in the kind of work involved (R. 121-122).

4. WOOD'S COMPLAINTS TO THE APPEALS COMMITTEE UNDER THE CONTRACT.

Wood made use of the Appeals Committee under the hiring provisions of the contract on two occasions during the events in this case. In February, 1960, Wood complained to the Committee that he had been improperly placed on the group four list (R. 23; 141). The complaint was dismissed by the Committee following hearing (*ibid.*). Again in March, 1960, Wood protested to the Committee that he had been discriminated against in not having been referred to the Walsh job (R. 23; 87-88). The Committee examined the books of the Chico hiring hall and interviewed Hamilton (R. 23; 142, 144-146). It was the unanimous decision of the Appeals Committee, however, that Wood's treatment in the hiring hall did not violate the hiring procedures of the contract (R. 23; 142, 148).

II.

THE BOARD'S CONCLUSIONS AND ORDER

The Board concluded that Wood "was refused referral by Respondent because of his membership in a 'railroad' rather than a 'wireman's' local, and not for the reasons advanced by Respondent" (R. 37). The refusal to refer Wood was therefore found to violate Sections 8(b)(1)(A) and

8(b)(2) of the Act. In addition, the Board declined to "give weight" to the determination of the Appeals Committee that Wood's treatment in the hiring hall had not been improper, because it was not clear that Wood's claim to be considered as a "special skills" man had been "fully considered." (R. 38).

The Board's order requires Local 340 to cease and desist from causing discrimination against Wood, "or any other employee or applicant for employment" and from "in any like or related manner" restraining employees in the exercise of their statutory rights. Affirmatively, the order requires Local 340 to pay Wood for any loss of wages caused by the refusal to refer him (R. 38-39).

ARGUMENT

SUBSTANTIAL EVIDENCE CONSIDERED UPON THE RECORD AS A WHOLE DOES NOT SUPPORT THE BOARD'S CONCLUSION THAT LOCAL 340 DISCRIMINATED AGAINST APPLICANT WOOD BECAUSE HE WAS A MEMBER OF LOCAL 800 RATHER THAN LOCAL 340.

A. The Issue Before the Court.

The Board's brief correctly states (p. 10) that a finding of a violation of the Act in this case can be supported only if there is a showing, first, that Local 340 prevented Wood from obtaining employment with Walsh Construction Company, and second, that the reason motivating Local 340 was Wood's non-membership in that Union. These separate elements of proof must independently be established to sustain the Board's conclusion. It is not enough for the Board to show alone that Local 340 deprived Wood of employment, for it has long been settled that the Act does not proscribe the denial of a job "for any reason other than union activity." *The Associated Press v. N.L.R.B.*, 301 U.S. 103, 132. See also *N.L.R.B. v. Kaiser Aluminum & Chemical*

Corporation, 217 F.2d 366, 368 (C.A. 9). Since a denial of employment may be premised on an infinite variety of considerations bearing no relation to union membership or activity, moreover, the circumstance of such a denial, standing alone, offers no support whatever for a finding that the denial was illegally motivated. As the Supreme Court recently has cautioned the Board, "we will not assume that unions and employers will violate the federal law, favoring discrimination in favor of union members against the clear command of this Act of Congress." *N.L.R.B. v. News Syndicate Co.,* 365 U.S. 695, 699. See also, *Teamsters Local 357 v. N.L.R.B.,* 365 U.S. 667, 676; *N.L.R.B. v. Sebastopol Apple Growers,* 269 F.2d 705, 711 (C.A. 9).

In the present case, it is not questioned that Local 340 declined to refer Wood to the job with Walsh Construction Company. Indeed, Business Manager Campbell testified that he had directed Hamilton, who was in charge of the hiring hall, not to dispatch Wood to that job, (*supra,* p. 7). Thus, the single question for decision by the Board was whether Local 340's reason for not referring Wood to the Walsh job was his membership in Local 800 rather than Local 340. Campbell and Hamilton testified that Local 340's treatment of Shulz's request for Wood was grounded upon their conviction that Shulz was attempting to circumvent the hiring hall procedure by obtaining named individuals to fill jobs rather than applicants who were next in line for selection under the non-discriminatory standards of the hiring hall. Shulz had already sought Union clearance for two members of his family, and Campbell understandably decided that such unfair favoritism should be stopped (*supra,* pp. 7-8). The Board, however, did not accept this explanation (R. 36-37). We do not now contend that the Board was required to adopt the reasons presented by Local 340's officials, although we submit that this explanation is far

more reasonable on the basis of the evidence than the explanation imputed by the Board, and must be considered in evaluating whether the record as a whole supports the Board's ultimate conclusion. We do contend, contrary to the reasoning implicit in the Board's decision, that a rejection of Local 340's reason for its conduct does not establish the correctness of the altogether different reason attributed by the Board to Local 340.[2] Such reasoning destroys the fundamental rule that the Board's General Counsel, in prosecuting the case, has the burden of proving unlawful motivation. See, e.g., *N.L.R.B. v. Kaiser Aluminum & Chemical Corp.,* 217 F.2d 366, 368 (C.A. 9); *Pittsburgh-Des Moines Steel Co. v. N.L.R.B.,* 284 F.2d 74, 83-84 (C.A. 9). Manifestly, to disprove a defense is not to prove the affirmative elements of a violation.

From the foregoing, it is apparent that the question before the Court is whether the conclusion of the Board that Wood was not referred because of his membership in Local 800 and his non-membership in Local 340 can be sustained by the evidence. Neither rejection of Local 340's proffered reason in this respect, nor the fact that Wood was not dispatched to the Walsh job constitutes supporting evidence for the Board. The unlawful reason attributed by the Board to Local 340 must stand or fall upon an appraisal of circumstances which bear a reasonable relation to the question of motivation. We turn, then, to an examination of the circumstances advanced by the Board in support of its position.

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2. The faulty analysis here criticized is particularly apparent in the Trial Examiner's Report, which elaborates upon the Examiner's reasons for rejecting Local 340's explanation, and thereupon concludes, with no more support than the Examiner's concept of what is "obvious," that the true explanation was Wood's non-membership in Local 340 (R. 26). In reaching its conclusion, the Board relied principally upon "the grounds cited by the Trial Examiner" (R. 35).

B. The Evidentiary Basis for the Board's Conclusion.

Two of the incidents upon which the Board rests its finding as to Local 340's motivation, especially emphasized in the Board's brief (pp. 14-15), occurred more than six months before the alleged violation, and are in no way related to the events comprising the alleged violation. First, the Board points out that in December, 1958, Business Manager Campbell, upon learning that Wood was a member of Local 800, replied, "That is bad" (R. 35). The entire testimony is as follows (R. 99-100):

> (Testimony of Jack L. Wood)
> ". . . I called the hall in Sacramento and asked to talk to Joe Campbell, and at that time he asked me over the phone what local I was out of, and I told him 800. He said that was bad. He said that is not so good—I beg your pardon—and I said, "What's so bad about it?"
>
> He said that they don't have wiremen, I believe that this is what he said, "Don't have wiremen in 800."
>
> * * * * * * *
>
> It was just, he told me it was just bad because I was a member of 800; I shouldn't work in a construction local."

There is no testimony in the record which suggests that Campbell's statements carried the sinister overtone of threatened discrimination which the Board attributes to them. On the contrary, the implication of the conversation is made plain by the explanation in the record that the majority of Local 340's contracts were with employers who used "wiremen's classifications," and that the different electrical skills called for in railroad work would probably not qualify Wood for work out of Local 340's hiring hall. See R. 103, 128, 137. The situation would be no different if a member of a wireman's local applied for referral out of a railroad local; it could not be expected that wireman's

experience would qualify the member for many jobs available in railroad work. Any other interpretation of Campbell's remarks is precluded by the fact that shortly after Wood registered with Local 340, following his conversation with Campbell, he was dispatched to a job where he remained for about a year (*supra,* p. 4). Under these circumstances, the incident cannot possibly reflect upon a union intent to discriminate against Wood fourteen months thereafter.

The second of these early incidents relied on by the Board is the refusal of Local 340 to accept Wood's traveling card from Local 800 and take him into Local 340's membership (R. 36). It is difficult to understand the significance the Board draws from this occurrence; no explanation beyond recitation of the event is contained in the Board's decision. It is not suggested that Local 340 acted improperly under its bylaws or constitution, or that Wood was in fact eligible for membership in Local 340. Indeed, the record is silent on the matter. The Act, moreover, makes explicitly clear that its provisions respecting union relations with employees are not meant to "impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." Section 8(b)(1)(A). Finally, it cannot seriously be suggested that the event had any relation to Wood's use of Local 340's hiring hall, for Wood at the very time was working on a job to which he was dispatched by Local 340, and it is similarly established that the hiring hall referred non-members of Local 340 without discrimination. See R. 128.

A further incident relied on by the Board relates to an argument between Wood and Jack Galvin, a business representative of Local 340 (R. 35). The incident occurred while

Wood was working on a job to which he was referred by Local 340, and apparently involved a charge someone had made that Wood was incompetent (R. 73-75). During the argument Galvin asked Wood, "Why don't you go back to where you came from?" The remark, Wood conceded, was made at a time when "Mr. Galvin and I both became perhaps pretty angry," and as far as the record shows, reflects nothing beyond a commonplace retort to an angry assertion. Speculation alone could connect such a remark with the treatment of Wood in the hiring hall many months later, for there is no showing that Galvin knew that Wood was a member of Local 800, that the remark implied a reference to that fact, that Galvin informed Campbell or Hamilton of the incident, or that Galvin had anything to do with the events in the hiring hall in the spring of 1960.

The single occurrence relied on by the Board which relates in time to the alleged violation in this case is Local 340's refusal to accept and grade Wood's examination which he took in January, 1960 (R. 36). Again, however, the Board does not, and on this record cannot show that Local 340 did not act in accordance with its internal rules and procedures in finding that Wood was ineligible to take the examination. Absent such a showing, it must be presumed that Wood was in fact ineligible, and that it would have been improper for Local 340 to accept the examination. Cf. *N.L.R.B. v. News Syndicate Co.*, 365 U.S. 695, 699. The Board does not explain how a valid determination that Wood was ineligible can be the basis for an inference that Local 340 intended to discriminate against Wood.[3]

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3. In a related incident, mentioned by the Trial Examiner (R. 18) but not by the Board, Hamilton reclassified Wood on February 5, 1960, to the group four list from the group three book. As shown *supra*, p. 8, the correctness of this reclassification was the subject matter of a complaint by Wood to the Appeals Committee,

The Board's decision mentions only one other circumstance to support a finding of unlawful motivation, namely, that Walsh Construction Company "is the type of a company that [Local 340] seldom [has] agreements with," and that Local 340 does not "have many members who had the special lead burning and mine locomotive skills requested by Walsh" (R. 36). The relation to the Board's conclusion of this observation, which the record most certainly supports as a factual matter, is not explained. It is unquestioned that Walsh Construction Company traditionally obtained its employees from Local 340's hiring hall (R. 57), even though its requirements differed from those of most employers with whom Local 340 dealt. If the Board means that an applicant whose skills are limited to those required by Walsh is not as likely to be dispatched from Local 340's hiring hall as an applicant with wireman's skills, this may readily be conceded, but it doesn't advance the Board's position. It has been agreed by all parties throughout this case that Local 340's hiring hall procedures, which qualify men for referral according to experience and training within classifications covered by the collective bargaining contract, are fully lawful. See R. 8, 46-50.

The foregoing discussion covers all the considerations presented by the Board which relate to its finding of an unlawful motivation. There is further discussion both in the Board's decision (R. 34-35) and the Board's brief (pp. 13-14) of the circumstances which show that Local 340 refused to dispatch Wood to the Walsh job. This fact, how-

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and the latter body determined that Wood was correctly classified in the group four list. The Board does not challenge the correctness of the reclassification (br. 8-9), just as it does not challenge the correctness of Local 340's ruling that Wood was not eligible to take the examination. It would appear that both incidents fall into the same class insofar as the present case is concerned, for neither can support an inference of an intent to act unfairly toward Wood if the validity of the union action is not contested.

ever, is conceded, and as shown *supra,* pp. 9-10, has no bearing on the single question before this Court, i.e., the sufficiency of the evidence as to unlawful motivation.

The evidence relied on by the Board which deals with motivation, moreover, must be evaluated in the light of countervailing evidence. *Universal Camera v. N.L.R.B.,* 340 U.S. 474, 488. Thus, the membership status of Wood as a consideration in Local 340's referral practices is shown to be of no significance by the fact that Wood had been cleared by the hiring hall on earlier occasions, and that other non-members of Local 340 have also been dispatched from the hiring hall (*supra,* pp. 4, 7). In addition, the inherent reasonableness of Campbell's explanation for declining to refer Wood to the Walsh job detracts from the Board's conclusion as to motivation.[4] It may be observed in this respect that the correctness of Campbell's conclusion that Shulz was playing favorites in requesting Wood, and was attempting to bypass the normal non-discriminatory referral procedure, is not in issue. It is enough to negate the Board's finding as to unlawful motivation that the information which Campbell had could reasonably support his opinion, and that he acted on that opinion. The record more than satisfies this requirement. See R. 118-127, 135-136.

Considered in the light of the entire record, the isolated and unrelated strands of evidence on which the Board relies for its conclusion as to Local 340's motivation have no more support than a circle of men sitting on each other's

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4. The Board's brief challenges Campbell's explanation by asserting that Local 340 "never indicated to Walsh in any fashion that Walsh was abusing the special skills provision of the contract." (p. 16). The brief errs. At a meeting with Shulz, Walsh's electrical superintendent, Campbell complained that "Shulz was not after that particular skill, that he was after the man" (R. 120, see also 121-122).

laps. As stated by this Court in *Morrison-Knudsen Co. v. N.L.R.B.*, 276 F.2d 63, 69:

> "The Board might suspect or surmise that the Union may have used its dispatch system to discriminate against non-union men, or to compel or encourage applications for membership. But such speculations are no substitute for proof of improper use of the system —much less for proof of an understanding that dispatching should be conditioned on union membership."

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Board's petition should be denied, and that its order should be set aside in its entirety.[5]

January, 1962.

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5. Before the Board, Local 340 contended that the Board, as a matter of administrative policy, should have given recognition to the decision of the Appeals Committee that there had been no improper discrimination against Wood. The Board has occasionally deferred to such internal procedures for the determination of disputes similar to that in the present case. We acknowledge, however, that the Board is not compelled by the Act to respect such awards, and for that reason do not renew the contention before the Court.

No. 17425

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 340, AFL–CIO, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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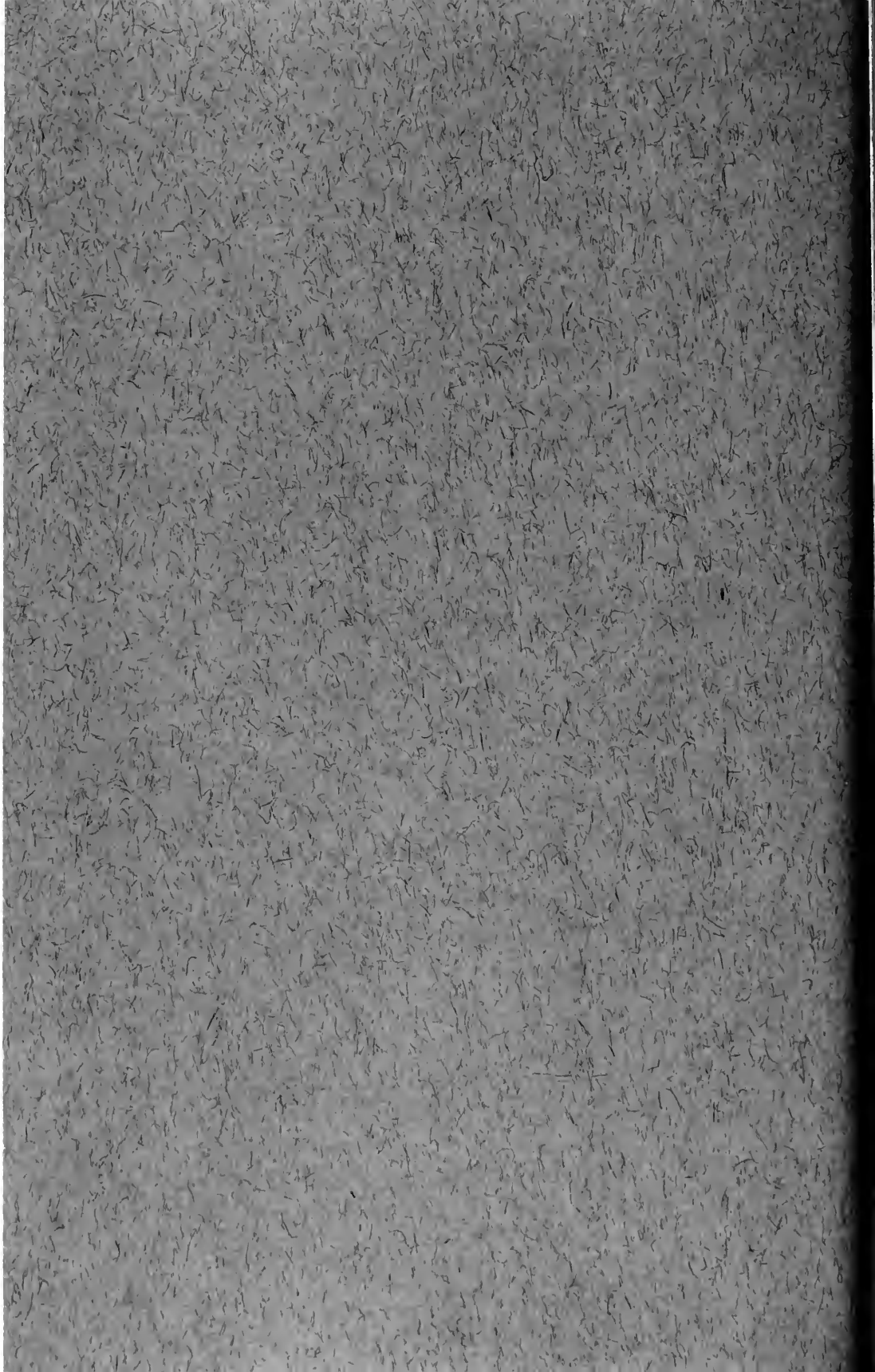

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ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court on petition of the National Labor Relations Board to enforce its order (R. 38–42)[1] issued against respondent on April 29, 1961, following the usual proceedings under Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*).[2] The Board's decision and order (R. 33–42) are

[1] References to portions of the printed record are designated "R". Whenever a semicolon appears, the references preceeding the semicolon are to the Board's findings; those succeeding are to the supporting evidence.

[2] The pertinent statutory provisions are reprinted *infra*, pp. 19–21.

reported at 131 N.L.R.B. No. 40. This Court has jurisdiction of the proceedings, the unfair labor practices having occurred at Chico, California, within this judicial circuit. No jurisdictional issue is presented (R. 4–5; 43–44).

STATEMENT OF THE CASE

I. The Board's findings of fact

Briefly stated, the Board found that respondent Local 340 (sometimes referred to herein as the Union), violated Section 8(b) (2) and (1)(A) of the Act by discriminatorily refusing to refer Jack L. Wood for employment with the Walsh Construction Company. The facts upon which the Board based its finding may be summarized as follows:

A. The discriminatory refusal to refer Wood

Respondent Local 340 represents employees in the Sacramento Valley area who are primarily skilled in the installation of wiring in connection with construction work, and is known in union parlance, therefore, as a "wireman's" local (R. 6; 103). At all times material herein, respondent has maintained a collective bargaining agreement with the Sacramento Valley Chapter of the National Electrical Contractors' Association, NECA, of which Walsh Construction Company is a member (R. 5–6; 44). Under the terms of this agreement the Union serves as the exclusive source of referrals for employment, and it maintains several hiring halls in the valley for this purpose (R. 6; 45–46).

The Walsh Construction Company, while utilizing mainly construction wiremen such as are provided by

respondent, also requires the services of electricians who are skilled in the maintenance and repair of DC batteries, battery switch gears, and battery operated mine locomotives, which the Company stores at its rail yards in Oroville, California (R. 9; 54–56).

Jack L. Wood, the charging party herein, was very familiar with this type of equipment (R. 10; 67–69). In May 1957 he happened to meet Rudolph C. Shulz, superintendent of Walsh's Oroville yard, and engaged him in a conversation concerning the various machinery stored there (R. 10; 69–70). Shulz told Wood that he needed a man with Wood's experience, and offered to hire him if he could obtain clearance from the Union [3] (R. 10; 70).

Wood, although affiliated with the I.B.E.W., was a member of Local 800, a so-called "railroad" local, whose members are primarily skilled in the repair and maintenance of heavy duty electrical equipment such as that owned by Walsh (R. 9–10; 69, 103). Wood obtained a clearance from respondent, and worked for Walsh until December 1958, when he was laid off (R. 10; 70).

After his layoff Wood reported to respondent's Chico, California, hiring hall seeking new employment (R. 10; 71). There he spoke to Business Manager Campbell, who asked Wood with what local he was affiliated (R. 35; 99–100). When Wood replied Local 800, Campbell said, "That is bad," and told Wood that he should not work out of a "wireman's" local

[3] An earlier collective bargaining agreement was then in effect (R. 10).

(*ibid.*). Campbell permitted Wood to register in the "traveler's" book, however, on the understanding that "members," i.e., members of Local 340, would be dispatched first (R. 10; 71–72). Later in the month Wood was dispatched to the firm of Wismer & Becker where he worked as a tunnel electrical foreman (R. 11; 72).

While on the Wismer job Wood attempted to join Local 340. He submitted his traveler's card and an application for membership, claiming completion of the two years' experience requirement to the Union's executive committee (R. 11; 72–73). About three months later, however, his card was returned to him with a statement that his application had been rejected (*ibid.*). The Union gave no reason for the rejection (*ibid.*). Also while on the Wismer job, Wood had a dispute with Galvin, one of respondent's business agents. During the argument Galvin stated to Wood that it was his (Galvin's) duty to protect the members of Local 340, and said to Wood, "Why don't you go back to where you came from?" (R. 35; 74–75). Wood nevertheless remained on that job until December 1959, when he quit for personal reasons (R. 15–16; 73).

On December 23, 1959, Wood again reported to respondent's Chico hiring hall seeking work (R. 16; 75–76). The collective bargaining agreement involved in the instant case had gone into effect by this time (R. 5–6; 44, 116). This agreement created a detailed classification system governing the order of dispatch of applicants for employment (R. 6–8; 46–50). In brief, the agreement provided that all applicants be

classified into five groups based upon the following factors: experience in the type of work covered by the agreement, passage of an examination, residency in the area, and length of employment under the agreement (*ibid.*). To be placed in group 1 an applicant had to satisfy the maximum requirements set out by the agreement as to each of these factors (*ibid.*). With each succeeding group the qualifications are less stringent than those of the preceding group, however, dispatch to available work is on the basis of group classification so that applicants in a lower numbered group enjoy preference over all applicants in higher numbered groups (*ibid.*). The order of referral within the group is based upon the date of the applicant's registration as available for work, so that the person with the earliest registration date will be referred first in his group (*ibid.*). The only exception to this system relates to the referral of employees in response to an employer's request for a man with special skills (R. 7–8; 50). In this regard Article IX, Sec. 4c, of the agreement provides (*ibid.*):

> When the Employer states *bona fide* requirements for *special skills* and *abilities* in his requests for application, the Business Manager *shall refer* the *first applicant* on the *referral list possessing such skills and abilities.*
>
> The Business Manager, when referring applicants with special skills shall take into consideration the applicant's *own estimate* of his ability to perform the work requiring such special skills, the applicant's *record* of *experience* on such work and the Business Manager's

> knowledge, if any, of the *estimate* which contractors have made of the applicant's *skills* and *abilities* to perform such work. (Emphasis added.)

When registering Wood on December 23, Hamilton asked him what local he belonged to (R. 16; 76). Wood replied Local 800, but noted that he had worked for both Wismer and Walsh (R. 16; 76–77). Hamilton registered Wood in Group III[4] (R. 16; 51). Thereafter, Wood reported to the hiring hall on the average of twice a week (R. 16–17; 77).

On January 5, 1960, Walsh began requesting men skilled in lead burning, welding and DC battery repair under the special skills provisions of the collective bargaining agreement (R. 12; 58–59). Through the month of January respondent did not dispatch anyone to Walsh although Wood was available for work and possessed the necessary skills.[5] (R. 12–13; 77, 79, 82). On February 5, Wood made certain that the Union

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[4] On February 5 Hamilton told Wood that it was a mistake to have registered him in Group III, and required him to re-register in Group IV (R. 18; 51, 84).

[5] During January Wood's efforts to obtain work and get a better classification under the group system were frustrated by union red tape and obstructionism. Thus, about two weeks after Hamilton registered him in Group III, Wood learned from a fellow electrician that he had to give written notice of availability to Hamilton to get work (R. 17; 77). When Wood asked Hamilton about this Hamilton said that he knew Wood was looking for work and that a post card would be sufficient (*ibid.*). Hamilton neglected to tell Wood, however, that he was also required to sign a dispatch book, and Wood, ignorant of these procedures, failed to do so (*ibid.*). Also at this time the Union offered its qualifying examination for classification in Group I. Wood told Hamilton that he was interested in taking the exam, but was forced to contact a member of NECA to learn when the examination was to be given (R. 17; 78–79).

knew that he possessed the special skills needed for the Walsh job by stating on his dispatch slip that he could do lead burning, welding and DC battery repair work, etc. (R. 18; 81–82). That same day, however, Hamilton dispatched a union member named Olds to Walsh, although Olds had just registered as available for work (R. 12–13; 52). Shulz rejected Olds when he conceded that he did not have the necessary qualifications for the job (R. 12–13; 60).

A week later respondent dispatched Ward (R. 13; 58–59). Ward, who was Shulz' son-in-law, had been requested by name on January 15 (R. 12; 59). At that time the Union told Shulz that Ward would have to sign the book (R. 12). Ward actually signed, however, about a month later than Wood (R. 12; 52). When Wood asked Ward why he had been dispatched first in view of his earlier registration Ward replied that Wood had not "verified" (R. 18; 94–95). Thereafter, Wood verified by initialing the dispatch book (*ibid.*).

Two weeks after the Union referred Ward, Shulz requested another employee. This request was open until March 18. On that date Wood spoke to Hamilton about the job and asked "How about me" (R. 19; 82). Although the opening was a matter of common knowledge at the hiring hall, Hamilton replied that he did not know anything about it (*ibid.*). However, a few

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Respondent never informed Wood of the results of the examination, and respondent's business manager Campbell testified that he was deemed ineligible to take the examination (R. 36; 127). Experience gained while in a "railroad" local was not considered relevant so far as a "wireman's" local was concerned (R. 36; 128).

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minutes later Wood met another electrician named Wheeler, a member of a "wireman's" local, and told him about the Walsh opening (R. 19; 82–83). Wheeler went in to speak to Hamilton, and after several minutes came out of the hall accompanied by Hamilton (R. 19; 83). As they passed by Wood, Wheeler waved a clearance slip at him (*ibid.*). Then Hamilton and Wheeler got into a car and drove out to the Oroville yard (*ibid.*). Wood followed in his car. At the yard Wood walked up to the place where Shulz, Wheeler and Hamilton were talking and asked Shulz if two men were needed (*ibid.*). Shulz said no. Wheeler then handed Shulz his dispatch card, and after Shulz interviewed him regarding his qualifications Wheeler was employed (R. 19; 61–62).

After the foregoing occurrence Wood asked Hamilton about the Walsh job every week when he went to the hall to sign the book (R. 19; 83–84). Usually Hamilton replied that he did not know anything about it (R. 20; 84). Shulz had in fact requested another man about two weeks after hiring Wheeler, and the Union had referred two more men (R. 14–15; 52–53, 62–65). One of these was dismissed after a half day trial, and the second rejected after an interview (R. 14–15; 64–65). Wood was never referred.

B. Wood's protest to the appeals committee

Twice Wood availed himself of the appeals procedures set forth in the agreement to seek review of Hamilton's treatment of him (R. 23; 87–88). The first of these appeals concerned Hamilton's reclassification of Wood from Group III to Group IV (R. 23). Since the question of Wood's group classifica-

tion is not in issue here (see pp. 16–17, *infra*), the facts relating to this appeal are not relevant.

Wood's second appeal concerned Hamilton's dispatch of Wheeler rather than himself to the Walsh job (R. 23; 87–88). Although the Committee sustained Hamilton's decision, it is not clear from the minutes whether they did so on the basis of Wood's right to the job under the group system or whether he had the necessary skills under the special skills provisions of the contract (R. 37; 144–146). The Committee appears to have been primarily concerned with the first issue (*ibid.*). As far as the second possibility is concerned respondent concedes that Wood possessed the necessary skills (R. 37; 125). In any event Wood himself was not invited to attend the hearing or present his side of the case to the Committee (R. 37; 100).

II. The Board's conclusions and order

On the basis of the foregoing evidence the Board concluded that respondent Union refused to refer Jack L. Wood for employment at Walsh Construction Company because he was not a member of a "wireman's" local, thereby violating Section 8(b) (2) and (1)(A) of the Act.[6] The Board ordered respondent to cease and desist from the unfair labor practices found, and to make Wood whole for any loss of pay he may have suffered as a result of respondent's discrimination against him (R. 38–40).

[6] The Board fixed the date of the first discrimination against Wood as February 12, 1960, as the record establishes that the Union knew of Wood's special skills no later than that date (R. 27, 37).

ARGUMENT

The Board properly found that respondent union violated Section 8(b)(2) and (1)(A) by discriminatorily refusing to refer Jack Wood to employment at Walsh Construction Company

Introduction

Section 8(b)(2) of the Act is explicitly directed at the elimination of improper union interference with employee job opportunities. Thus, that section, in relevant part, forbids "a labor organization or its agents * * * to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)." The latter subsection, with qualifications immaterial here, forbids employer "discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization." By these interlaced provisions, Congress has forbidden union interference with jobs where it is shown first, that a union has attempted to cause or succeeded in causing an employer to discriminate, and secondly, that such discrimination tends to encourage or discourage union membership. See *Radio Officers' Union* v. *N.L.R.B.,* 347 U.S. 17, 42–43; *Local 357, Teamsters* v. *N.L.R.B.,* 365 U.S. 667. There is no issue here as to the first element of an 8(b)(2) violation, for Wood's failure to be employed by Walsh was admittedly "caused" by the Union's refusal to refer him. We show below that the second essential component of Section 8(b)(2) has also been established in this case. We also show that the Board properly rejected a determination by an "appeals committee" as binding upon it.

A. *The record supports the Board's conclusion that respondent union refused to refer Wood to Walsh because of his lack of membership in the union*

Wood, the charging party herein, was a member of Local 800, I.B.E.W., whose members were primarily skilled in the maintenance and repair of heavy electrical equipment—principally locomotives. Local 800 is known as a "railroad local." Respondent Local 340 is also affiliated with I.B.E.W. Its members are primarily skilled in the installation and maintenance of wiring used in construction—it is known as a "wireman's local." Respondent was a party to a contract with Sacramento Valley Chapter, National Electrical Contractors Association, of which Walsh was a member, and respondent pursuant to this agreement served as the exclusive wiring agent for Walsh. In the operation of this agreement, respondent generally rated job applicants in its hiring hall by reference to their wireman's experience. This system resulted in a preference being given in available employment to wiremen, and accordingly to employees who had worked under an agreement administered by respondent. With respect to job referrals generally then, Wood's railroad background placed him at a disadvantage. Walsh, although utilizing in the main employees skilled in wiring installations, also required some electricians experienced in heavy equipment work, including the repairs and maintenance of mine locomotives, battery switch gears, large DC batteries and transformers. Apparently to take care of this type of situation the contract between the Association and respondent contained a "special skills" provision

under which respondent agreed to refer men outside the regular system when an employer requested an electrician with special skills other than those normally possessed by respondent's members. Under the special skills provision of the agreement, Wood's membership in a "railroad local" was no handicap to his obtaining a job, for this part of the agreement required only that the applicant be the first man on the list possessing the requested skills in order to be referred.

It was respondent's failure to refer Wood to a job at Walsh, despite a request by Walsh for a man possessing Wood's special skills, that constituted the violation of the Act here involved. The Board found in all the circumstances that respondent's refusal to refer Wood to that job was discriminatorily motivated.

The circumstances of Wood's first attempts to get work through respondent's hiring hall, as well as the particular circumstances of respondent's refusal to refer him to Walsh, fully support the Board's conclusion in this respect. Thus, when Wood first came to respondent's hiring hall in December 1958, respondent's business manager, Campbell, asked Wood what local he was from. When Wood replied "Local 800," Campbell said, "that is bad," and added that Wood should not work in a construction local—such as Local 340. In November 1959, Wood had a dispute with Galvin, one of respondent's business representatives. The latter told Wood, "why don't you go back to where you came from?" At about this time respondent also rejected without explanation Wood's travelling card from Local 800. Again, in January 1960, when Wood took Local 340's examination to

qualify himself for a higher grouping under respondent's referral system (aside from the "special skills" provision), respondent never notified him of the results. According to respondent's business manager, Wood was not even eligible to take the examination because his work under a railroad local's jurisdiction was not considered relevant experience. These circumstances demonstrate respondent's extreme reluctance to refer Wood, as a member of a railroad local, to jobs within respondent's contractual jurisdiction.

On December 23, 1959, Wood registered at the Union's hiring hall and he continued to return to the hall several times a week during the next few weeks seeking employment. Starting about January 5, 1960, Walsh began to request employees from the Union pursuant to the special skills provision of the contract. On February 5, 1960, respondent dispatched a union member named Olds to Walsh pursuant to the special skills agreement, although Olds had registered as out of work only that day, whereas Wood had registered 2 weeks earlier. A week later, respondent referred employee Ward to the Walsh job. Ward, who was the son-in-law of Walsh's electrical superintendent, Shulz, had been requested by name by the Company on January 5. At that time, the Union told Shulz that Ward would have to sign the book. Ward actually registered in the union hall on January 22, 1960, a month after Wood registered. About February 26, Shulz again called respondent's hiring hall and asked for another man with the same special skills. Wheeler, who registered at the hall

March 11, 1960, was sent to the job on March 18. On subsequent occasions Walsh requested a special skills man and each time the Union sent someone who registered with the Union long after Wood. The second of these employees, McAdams, was rejected by Shulz.

During this period, Wood took pains to let the Union know he possessed the type of special skills in the various Walsh jobs. Yet on March 18, 1960, for example, when Wood mentioned to Business Agent Hamilton, "I think there is a job open at Walsh's for a man with special skills. How about me?" Hamilton replied, "I don't know anything about it." The evidence shows that Walsh's needs for men with special skills in lead burning, wiring, DC battery repairing, etc., were openly talked about at the union hall, and indeed continuing requests for such men had been made to the Union. There is no question but that Wood possessed these special skills, and the evidence plainly shows respondent knew, at least by February 12, 1960, that Wood did possess them. Thus, on each occasion that Walsh asked for a man with special skills, the Union bypassed Wood in favor of someone who had registered as out of work later than Wood, despite the fact that the contract special skills provision required that the first qualified man on the list was to be referred. On several occasions, respondent delayed sending anyone until someone other than Wood had registered, thus refusing to refer Wood even when he was the only qualified man on the list.

In all these circumstances, particularly in the light of the background of statements by Union officials to

Wood with respect to his membership in a "railroad local," the Board was fully justified in concluding that that membership was the motivating factor in respondent's refusal to refer Wood to the special skills jobs at Walsh. A refusal to refer based even in part on the fact that Wood was a member of the wrong kind of local plainly violated the proscriptions of Section 8(b)(2) and Section 8(b)(1)(A) of the Act. *N.L.R.B.* v. *Heat & Frost Insulators,* 261 F. 2d 347, 350 (C.A. 1); *N.L.R.B.* v. *Local 10, I.L.W.U.,* 214 F. 2d 778, 781 (C.A. 9); *N.L.R.B.* v. *Local 542, I.U.E.,* 255 F. 2d 703 (C.A. 3).

Before the Board, respondent argued that the basic reason for refusing to refer Wood was its belief that Walsh was attempting to bypass the referral procedure in the contract by the repeated requests for a man with particular skills and abilities. The facts, however, belie this assertion. For, had respondent really been concerned about the bona fides of Walsh's requests, it could scarcely have sent men to Walsh on each occasion someone with special skills was requested. Nor, in all the circumstances, does respondent's contention that it believed Walsh's requests were a subterfuge for obtaining a particular individual, i.e., Wood, militate against the board's conclusion. For when Ward, Shulz's son-in-law, was requested by name under the special skills provision of the contract, respondent referred Ward after he signed the out of work register. Indeed, as respondent's business manager, Campbell, admitted, Walsh was "the type of Company that we seldom have agreements with,"

because few members of Local 340 could perform the specialized work at Walsh's Oroville Yard operations. It was therefore evident that Walsh, to secure qualified help, perforce had to obtain employees under the special skills provision of the contract; it could not use ordinary wiremen to fulfill those needs. This factor comports then with respondent's having sent men to Walsh as requested, even though the men sent were not at the top of the regular list but were referred as special skills men. Finally, respondent never indicated to Walsh in any fashion that Walsh was abusing the special skills provision of the contract. In all these circumstances, respondent's later position in this respect was a manifest afterthought which the Board could fairly reject.

B. *The Board properly refused to honor the decision of the appeals committee*

As noted in the statement, Wood twice availed himself of the appeals procedure established in the contract, on the first occasion appealing only the Union's failure to place him in a higher classification group, and on the second appealing the dispatch of Wheeler rather than himself to the Walsh job. On each occasion the Appeals Committee ruled against Wood. The first decision of the Appeals Committee is not relevant here, for the discrimination against Wood had nothing to do with his placement on the regular list of the Union pursuant to its regular referral procedures. As to the second, as the Board found, "Wood was not invited to appear or to give evidence as to his side of the controversy" (R. 23). Furthermore, although the record shows that the Appeals Committee was pri-

marily concerned with whether Wood had shown proof of his qualifications for a job at Walsh, it does not make clear whether these qualifications were considered with reference to the group classifications system or to the special skills provision. As respondent concedes Wood's special skills with respect to the Walsh job, and plainly knew of them at least as early as February 12, 1960, it would appear more likely that Wood's qualifications other than his special skills were at issue. Moreover, it does not appear that the Appeals Committee considered Wood's case with reference to the contention at issue here—that the Union's refusal to refer him was based on his membership in a railroad local. For all these reasons, we submit, the Board was well within its discretion in refusing to give controlling weight to the Appeals Committee decision in question. As the Seventh Circuit said in *N.L.R.B.* v. *International Union United Auto Workers,* 194 F. 2d 698, 702, in rejecting the union's contention that an order of the Wisconsin Employment Relations Board and several arbitration decisions precluded the National Labor Relations Board from finding a violation: [7]

> This argument cannot be sustained in view of Section 10(a) of the Act * * *. Thus the Act confers upon the Board exclusive jurisdiction to prevent unfair labor practices within the meaning of the statute. The Board's ex-

[7] See also, *N.L.R.B.* v. *Walt Disney Productions*, 146 F. 2d 44 (C.A. 9); *N.L.R.B.* v. *Bell Aircraft Corp.*, 206 F. 2d 235 (C.A. 2); *Monsanto Chemical Co.*, 97 NLRB 517, enf'd 205 F. 2d 763 (C.A. 8).

clusive function in this field may not be displaced by action before State agencies or by arbitration.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the order of the Board in full.

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Attorneys,
National Labor Relations Board.

DECEMBER 1961.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day fol-

lowing the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom

membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1961

No. 17425

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

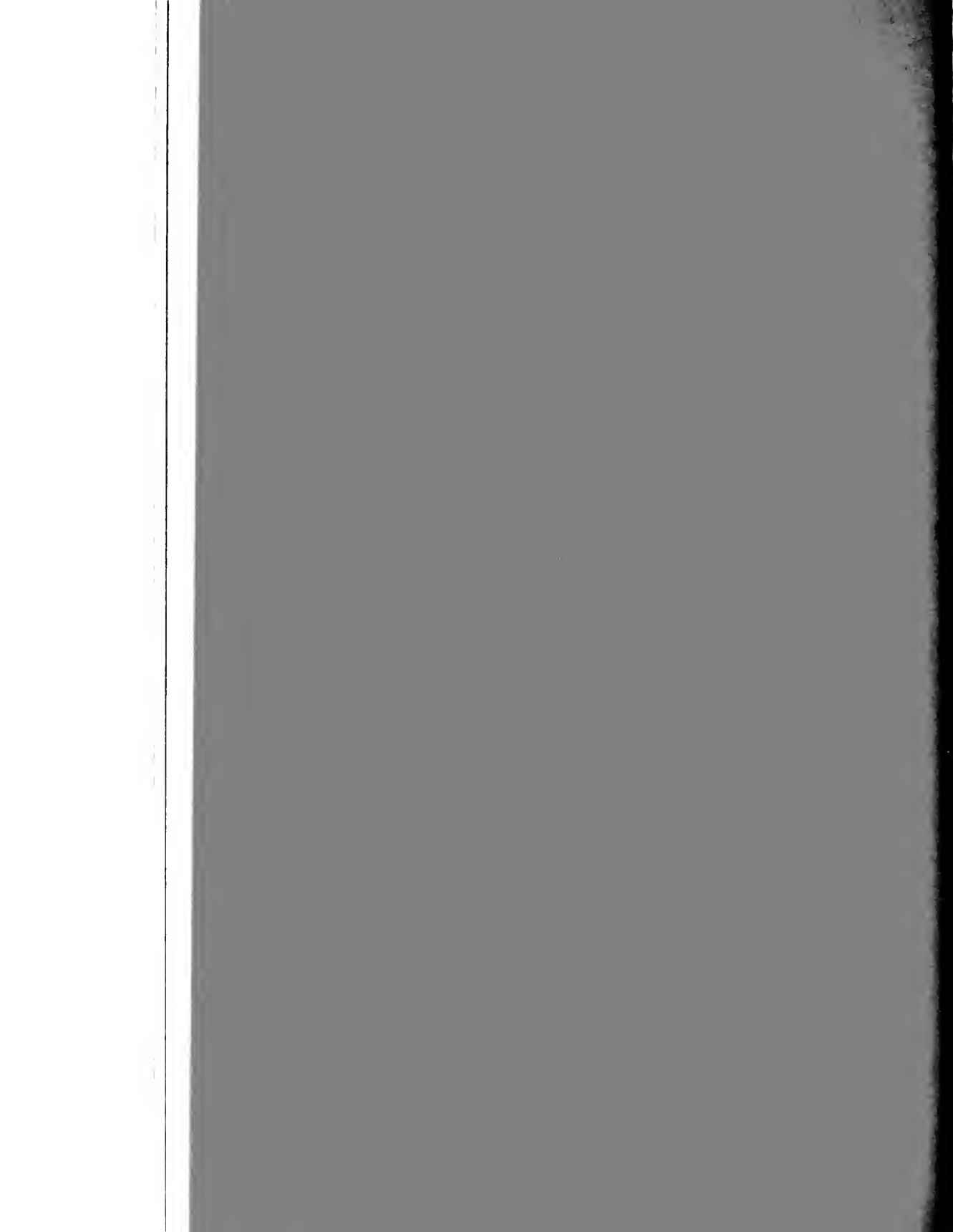
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 340, AFL-CIO,

Respondent.

Transcript of Record

Petition for Enforcement of an Order of the National Labor Relations Board

Phillips & Van Orden Co., 4th & Berry, S. F., Calif.—Rec. 10/4/61—Printed 10/25/61



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States of America
Before the National Labor Relations Board
Division of Trial Examiners
Branch Office, San Francisco, California

Case No. 20-CB-760

ELECTRICAL WORKERS, INTERNATIONAL BROTHERHOOD OF, LOCAL UNION 340, AFL-CIO,

and

JACK L. WOOD, An Individual

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BRUNDAGE, NEYHART, GRODIN & MILLER
By JOSEPH R. GRODIN, ESQ.,
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For the Respondent.

Before: David F. Doyle, Trial Examiner.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

This proceeding with all parties represented was tried before the undersigned Trial Examiner at San Francisco, California, on June 21 and July 6, 1960, on complaint of the General Counsel and answer of the above-named Respondent. The issues litigated

were whether or not the Respondent violated Section 8(b)(1)(A) and 8(b)(2) of the Act by certain conduct, which is more particularly described hereinafter. Upon the entire record and my observation of the witnesses I hereby make the following:

Findings and Conclusions

I. The business of Walsh Construction Company

Upon a stipulation of counsel it is found that Walsh Construction Company, herein called the Company or Walsh, is an Iowa corporation with its main office at Davenport, Iowa. The Company is engaged in all types of heavy construction such as the building of bridges, large buildings, industrial plants, power houses and tunnels.

During the calendar year ending December 31, 1959, the Company, in the course of its business operations, performed services valued in excess of $50,000 in states other than the State of Iowa. It is conceded that the Company is engaged in operations affecting commerce within the meaning of Section 2(6) and (7) of the Act, and I find that the assertion of jurisdiction herein is warranted.

II. The labor organization involved

It is admitted and I find that International Brotherhood of Electrical Workers, Local Union 340, AFL-CIO, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. The unfair labor practices

The issues

The complaint alleges that on or about January 20, 1960, and continuously thereafter, the Union by its designated representatives in the course of the operation of its hiring hall, refused to clear or dispatch Jack L. Wood to the Company for employment because of Wood's lack of membership in the Union and that by this conduct the Union attempted to cause and did cause the Company to discriminate against Wood in violation of Section 8(a)(3) of the Act; thereby engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) and 8(b)(2) of the Act.

The Union denies the commission of the alleged unfair labor practices and contends that its refusal to dispatch Wood, was based on its belief that Shulz, superintendent of the Company was attempting to bypass the referral procedure in order to employ Wood, and that the repeated requests of Shulz, for men with "special skills" was a subterfuge for this purpose.

Undisputed facts forming the background of the controversy

It is undisputed that the Union operates in a group of counties in Northern California, with hiring halls at Sacramento, Redding, Marysville, and Chico in that state. As the representative of its members the Union has a contract with the Sacramento Valley Chapter, National Electrical Contrac-

tors Assn., Inc., herein called NECA, and other individual electrical contractors in this group of Northern California counties. The Company is a party to this contract. It is undisputed that the Union is an "inside and outside wireman" local and as such is principally concerned with the supplying of men for the installation, repair and maintenance of wiring in connection with industrial, commercial and residential construction.

The contract between the Union and NECA, by which the Company is bound sets up a rather complicated system of dispatch at the Union's hiring halls. Article IX of the Contract entitled, Referral Procedure, states that the Union shall be the sole and exclusive source of referrals of applicants for employment; that the employer shall have the right to reject any applicant for employment; and that the Union shall select and refer applicants for employment without discrimination, by reason of membership or nonmembership in the Union. The Article then states that all such selections and referrals shall be in accordance with certain groupings of men, based on various qualifications. These may be summarized as follows:

Group 1. Applicants, who have proof of (1) 48 months experience on types of work covered by the agreement; (2) have passed an examination, and (3) are residents of a certain area; and (4) have been employed for at least 12 months under the collective bargaining agreement within the preceding 48 months.

Group 2. Same requirements as (1) and (2) above, and have worked under a collective bargaining agreement in the geographical area surrounding the "normal construction labor market" as defined in the agreement.

Group 3. Same requirements as (1) and (2) above; place of residence and location of prior work experience are not considered.

Group 4. Experience requirement reduced to 24 months; examination is eliminated, but residency same as in Group 1, and prior work in the area of 12 months.

Group 5. Applicants who can show only 12 months experience on the type of work covered by the agreement.

Article IX then continues, and the section relative to men with special skills is especially significant:

Section 4c. Applicants' names will be placed on the referral list in the order in which they register their availability for work. Persons in Group 1 shall be referred first, in that order, and the same procedure shall be followed successively for Groups 2, 3, 4 and 5, subject to the following qualification:

When the Employer states bona fide requirements for special skills and abilities in his requests for applicants, the Business Manager shall refer the first applicant on the referral list possessing such skills and abilities.

The Business Manager, when referring applicants

with special skills shall take into consideration the applicant's own estimate of his ability to perform the work requiring such special skills, the applicant's record of experience on such work and the Business Manager's knowledge, if any, of the estimate which contractors have made of the applicant's skills and abilities to perform such work.

Section 4d. Decisions of the Business Manager in referring applicants are appealable to the Appeals Committee as herein provided. Such appeals shall be made within forty-eight hours and a decision of the Appeals Committee shall be rendered within one week after receipt of the appeal by the Committee. Forms will be provided at the dispatch office for appeals.[1]

In connection with the contract between the Union and NECA, it is worthy of note that the General Counsel in this proceeding concedes that it meets the requirements of the Mountain Pacific decision.

Certain other facts are not disputed. It is admitted that Stanley Hamilton, a business agent of the Union, is the sole representative in charge of the Chico hiring hall and in his capacity as business agent acts as dispatcher of men from that hiring hall. It is also undisputed that William J. Campbell is the business manager of the Union and as the top executive of the organization is the officer in charge of the four hiring halls of the Union to which he gives over-all, if not immediate, supervision.

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[1]This contract is G. C. Exhibit No. 2 in evidence.

Likewise, some of the facts concerning the Walsh Construction Company and its operations are not in dispute. Among these is the fact that Walsh Construction Company engages in all type of heavy construction work, but in the area with which we are here concerned, the principal occupation of the Company is the drilling and construction of tunnels in the mountainous region of California for use by hydro-electric power companies, railroads or governmental agencies. The Company maintains at Oroville, California, a large yard for the storage and repair of its tunneling equipment, much of which is composed of mine locomotives and other heavy equipment using heavy-duty DC batteries, similar to those in railroad locomotives. The Oroville yard is maintained by the Company as a place of repair of this equipment during and between jobs. It is not disputed that Rudolph C. Shulz is the electrical superintendent of the Company in charge of all electrical work on the West Coast and particularly of the Oroville yard at which Shulz maintains his office.

It is similarly undisputed that Jack L. Wood, the individual who is the charging party herein is an electrician, and a member of Local 800, IBEW. Prior to June, 1953, Wood lived at Laramie, Wyoming, and worked for a period of four years as a mine electrician for the Union Pacific Coal Company. During that period he was a member of Local 775, IBEW, which is a local that has jurisdiction over railroad electricians. He moved to California

in 1953 and began his work there with the Western Pacific Railroad Company at Oroville, again as an electrician. In that job he joined Local No. 800, IBEW, located in Sacramento. This local is also a "railroad" local having jurisdiction over railroad electrical employees. In May of 1957, Wood became employed by the Walsh Construction Company at its Oroville yard. His employment on this occasion appears to have been a matter of chance, as he went to the Oroville yards for another purpose and noticed that a large amount of the equipment consisted of mine locomotives with which he was very familiar. He happened to run into Shulz and in the course of the conversation that ensued Shulz said that he could use a man of Wood's skills and experience and suggested that Wood go to Sacramento and get a clearance from the Union so that Wood could go to work for Shulz. Wood went to the Union hiring hall in Sacramento, then operated under a previous contract, received his clearance and went to work for the Walsh Construction Company under the supervision of Shulz. This employment lasted approximately 19 months, until Wood was laid off in December, 1958.

Upon being laid off he went to the Union's hiring hall at Chico and registered in one of the union's dispatch books. At that time there was one book for members and a second book for travellers. The business agent told him that he should sign in the travellers book and he understood that members would be dispatched before travellers. Later that

month the Union dispatched Wood to a job with the firm of Wismer & Becker where he worked as a tunnel electrical foreman for approximately one year. During this time he paid his usual dues of $7.40 per month to Local 800 IBEW and paid a "dobie" of $5.50 per month to the Union. During this time Wood attempted to join the Union. He calculated that he had completed his two years' experience so he presented an application for membership and his traveller's card to the Executive Board of the Union in the summer of 1959. However, about three months later he was notified that his card would not be accepted at that time. Wood continued in the Becker & Wesmer job until December, 1959, when he quit for reasons hereafter related.

The controversy; the job; the requests of the Company and the men dispatched

Rudolph C. Shulz testified credibly that the only electrical work performed by electricians at the Oroville yard is the repair of mine locomotives, battery switch gears, large DC batteries and transformers, all of which are used in tunnel-drilling operations. At the yard the Company has about $150,000 worth of this special equipment, which the men keep in repair. To do this job he needed men possessed of particular skills and abilities as some of the larger batteries were ten feet long, and about five feet wide with a weight of about five tons, and were valued at $9,000 each. Also, from time to time the mine locomotives were stripped down to the iron

and rebuilt. This was work that could not be done except by electricians with special skills and experience in that field.

Shulz testified that early in January, 1960, there was only one man employed at the yard, his son, Robert Shulz, but because the Company had received a new tunnel contract he decided to increase the work force. On or about January 5, 1960, Shulz phoned Stanley Hamilton, business agent and dispatcher for the Union at its hiring hall at Chico, California. On this occasion Shulz told Hamilton that Ward, Shulz's son-in-law, had returned from a job that he had been on with the Company in Nevada, and that he would like to have Hamilton clear Ward to work in the Oroville yard. Hamilton said that Ward would have to come to the Union hall and get on the book, that he couldn't clear him without signing the book. Also at this time Shulz told Hamilton he was in need of a man who could repair batteries, repair DC locomotives and charging sets and do some setting and welding and some lead burning. Hamilton said that he would try to find someone for Shulz who had those special skills.

It should be noted that Ward actually registered in the Union hall on January 22, 1960.

Shulz further testified that on or about February 5, 1960, the Union sent to Shulz a man by the name of Olds, as an electrician possessing the special skills which Shulz needed. Shulz interviewed Olds and by the latter's own admission he wasn't qualified to

fill the job, so Shulz sent Olds back to the Union hall. It should be noted that counsel stipulated that Olds, a union member was registered for the first time on February 5, 1960, and dispatched to Shulz on the same day. Also, on or about this date of February 5, 1960, Shulz had a phone conversation with Hamilton in which Shulz pointed out that Hamilton had a man at the hall, Wood, who had previously worked at the Oroville yard, and who possessed the special skills that Shulz needed.

On February 12, 1960, Ward was referred by the Union to Shulz and on that date began his employment in the Oroville electrical shop.

Approximately two weeks after this date, or about February 26, Shulz again called the Union hall and said that he needed another man possessing the same special skills.

It was stipulated by Counsel that W. Wheeler registered in the Group I book on March 11, 1960.

On March 18, Wheeler arrived at Shulz's office at Oroville yard with a referral slip from the Union. Accompanying Wheeler on this occasion were both Hamilton and Wood. Hamilton brought Wheeler in and introduced him to Shulz, and Wheeler gave Shulz his dispatch card to go to work. Shulz knew Wheeler as having been employed by the Company in the yard some year or two previously, and recollected that he had the necessary skills to perform the job so he was employed immediately. At this time Wood asked Shulz in the presence of Hamil-

ton, if Shulz did not need another electrician. Shulz replied that at that time he did not.

About two weeks later, Shulz again called Hamilton for another man and mentioned that he needed the same type of man with the same special skills as that was the only type of work that he had to do. Hamilton said that he would try to find some one with those special skills. Shulz did not remember whether Wood's name was mentioned in this phone conversation.

It was stipulated by Counsel that Charles Wing registered in Group I on March 18, 1960, and was dispatched to the Walsh job on April 22, 1960. On that date, according to Shulz, Wing was referred to Shulz by the Union. Shulz interviewed Wing and came to the conclusion that he did not possess the skills which Shulz sought. However, in order to give him a chance to qualify Shulz put him to work checking some batteries. After Wing had worked about four hours it became apparent to Shulz that he didn't know what he was doing, so he made out a discharge slip for Wing and sent him to the office for his pay.

On the day after Wing was rejected, Shulz called Hamilton again and told him he still needed an electrician to fill the job with special skills and Hamilton again said he would find some one. About a week later Hamilton and Campbell, the business manager of the Union, came to the shop. They said they wanted to discuss with Shulz his request for these

men with special skills. They had a short discussion and then Campbell said he would find Shulz some one with the special skills. A few days later, on May 3, 1960, a Mr. McAdams appeared on the job with a referral slip as a man possessing the special skills. Shulz asked him a few simple questions about what takes place in a battery when it is charged and discharged and McAdams could not answer. Shulz also gave him a simple wiring diagram of a locomotive and asked him to tell him the sequence of operation. The man could not answer this question either, so Shulz felt that he wasn't qualified to do the work and sent him back to the Union hall. That same afternoon Hamilton called Shulz again and asked him if he was still in need of a man to do the work with these special skills. Shulz replied in the affirmative. However, Shulz had not received any men from the Union hall since that date

Counsel stipulated that McAdams registered in Group I on May 2, 1960, and was referred to the job and rejected by Shulz on May 3, 1960.

It is undisputed that after May 3, 1960, the Union referred no more men to Shulz.

The registration of Wood,
the dispatch of other men

Jack L. Wood, the charging party, testified credibly that in late 1959 his daughter became ill so he wanted to find work in the Oroville area, where he owns his own home so he quit the job he had with

the firm of Wismer & Becker and went to the Union's hiring hall at Chico and registered for work on December 23, 1959. It was stipulated by counsel that on this date Wood was registered in Group III. On this occasion Wood talked to Hamilton who was in the Union office at his desk. Wood asked to sign the out-of-work book and Hamilton handed him a book. Wood said, "I have to be in Group I." Hamilton said that he properly belonged in Group III. Hamilton then explained that Wood would have to pass an examination to be in Group I. Hamilton then asked Wood what Union he belonged to and Wood replied that he belonged to Local 800, I.B.E.W. Wood at that point told Hamilton that he had just come from the Union Valley Job (the Wismer & Becker job) and had broken in Leighton, the man dispatched by the Union to replace him. Hamilton said that Leighton didn't need breaking in, that he was a tunnel man. On this occasion Wood sat around the hiring hall for approximately one-half hour, and at one point mentioned to Hamilton that he had worked for the Walsh Construction Company at the Oroville yard. Wood testified that he had forgotten any reply made by Hamilton to this information.

The Chico hiring hall is open one hour each day in the morning on Mondays and Wednesdays and, one hour in the morning and one hour in the afternoon on Fridays. Between December 23, 1959, when he first registered and February 5, 1960, Wood returned to the hiring hall at Chico on an average of

twice a week, each time asking Hamilton if there were any job vacancies. After a couple of weeks somebody told Wood that he was supposed to notify Hamilton in writing that he was available for work. Wood asked Hamilton if that was required, Hamilton said he knew that Wood had been in the hall, and that Wood could send in a post card notification if he wanted to, but Hamilton did not offer any book to Wood for his signature. At that time Wood was unfamiliar with the terms of the contract and did not know that there was a place in the book which he was required to sign to obtain dispatch. Also during this period the Union posted a notice of wireman's examination by which the men moved from one group to a higher group. Wood told Hamilton that he would take the examination if it would put him in Group I. Wood did not remember what Hamilton replied. At this time Wood telephoned to Krivanek, chairman of the NECA, and asked him if he knew when the examination would be held. He was told that the examination would take place on January 16. According to Wood he talked to Hamilton both before and after that date on which he took the examination and on one occasion asked Hamilton when the results of the examination would be posted. Hamilton said the results of the examination would be announced at the next Union meeting. Also during this period Wood had a further conversation with Hamilton in which he told Hamilton that he had worked for the Walsh Construction Company and had done the type of work that Walsh had at the yard. Also around this

time Wood talked with Hamilton about what Group he should be in and in consequence of that conversation he obtained a statement from Local 800 showing that he had passed an experience rating test but when Wood presented this test to Hamilton the latter would not accept it.

On February 5, 1960, Wood was in the dispatch hall to see about work when Hamilton gave him the Group IV book to sign. Wood asked why he was being given the Group IV book. Hamilton replied that Wood was not entitled to be in Group III. Wood signed the Group IV book. Also at an early date in February, Wood heard that Walsh Construction Company had asked for men with certain special skills which were needed in the repair of locomotives and batteries at the Oroville yard. When Wood heard of this, thereafter he noted on his dispatch slip that he had the skills of lead burner, welder and DC battery repairman, etc.

Wood testified that on February 12, 1960, he went to the Union hall with Ward and saw the dispatch slip given to Ward. It stated that Ward had special skills of lead burning and DC battery repair. Wood asked Ward, why he was cleared before Wood and Ward said that Hamilton had said that Wood had not "verified" by signing the out-of-work book. After that Wood "verified" by writing the date and his initials in the book.

Thereafter between February 12, and March 18, it was openly discussed at the Union hall that Shulz

of the Walsh Construction Company was calling for a man with special skills of lead burning, welder, DC battery repairman, etc.

On March 18, 1960, Wood went to the Union hall and said to Hamilton, "I think there is a job open at Walsh's for a man with special skills. How about me?" Hamilton replied, "I don't know anything about it."

A few moments later Wood met another electrician by the name of Wheeler in front of the Union hall. He told Wheeler about the job and what Hamilton had said. Wheeler then said that he would go into the hall and ask Hamilton about the job. A few minutes later Wheeler came out of the Union hall accompanied by Hamilton. Wheeler waved a clearance slip at Wood. Hamilton and Wheeler got into a car and proceeded toward Oroville, so Wood followed in his car and found that Hamilton and Wheeler went to Walsh's yard. Wood went to the place in the yard where Wheeler, Hamilton and Shulz were talking and Wood said to Shulz, "Didn't you want two men?" Shulz said, "No." Then Wheeler gave his dispatch card to Shulz and Shulz asked him about his qualifications and put Wheeler to work.

After that occurrence on every occasion that he went to the Union hall Wood would ask Hamilton about the Walsh job. Also after February 5, 1960, Wood signed the out-of-work book every seven days. On most occasions when Wood asked Hamilton

about employment at Walsh Construction Company Hamilton replied that he didn't know anything about Walsh needing a man.

Wood was never dispatched to the Walsh job.

William J. Campbell, business manager of the Union, testified in its defense. Campbell said that he believed that Hamilton called him and informed him that Shulz was ordering a man and had asked for Ward. He agreed that Ward had the special skills because he knew that Ward had worked for the Walsh Construction Company for quite a number of years. He told Hamilton that if Ward was the only man on the referral list and had the qualifications that he could send Ward to the job. After that Hamilton called him again and said that Shulz wanted another man with the same qualifications. He told Hamilton that he could not believe that Shulz needed more than one man with the special skills. Campbell testified that in his opinion he did not believe that Shulz's request for a man with special skills was a bona fide request and that he instructed Hamilton not to dispatch Wood to the Walsh Construction Company job. He said that he was also suspicious of Shulz, because Shulz was employing his son in the yard and that the son did not have the qualifications of an electrician. After he learned that Shulz had rejected several men who were sent to the job he became convinced that Shulz's request for a man with special skills was a subterfuge to evade the referral procedure.

In view of Campbell's testimony, the examination of Stanley Hamilton, the business agent of the Union, who actually did the dispatching herein, is especially illuminating. He was examined by the General Counsel as an adverse witness under Rule 43-B. When the examination of Hamilton reached the dispatch of specific men, Hamilton found himself in considerable difficulty. He stated that the first man he dispatched to the job was Arnold Olds, a member of the Union, who was dispatched on February 5, 1960. He admitted that Olds registered on the same date and was assigned to Group I. Hamilton said he referred Olds to the Walsh Construction Company because of a prior conversation with Shulz. Upon further questioning, Hamilton said that in this conversation Shulz had said that he wanted a man with special skills for DC-motor repair, battery repair, and lead burning. Hamilton then stated that he didn't refer a man to the job for the next 15 days until Olds registered, because he didn't have a man with those qualifications. When he was asked why he hadn't dispatched Wood, who had those qualifications, he replied that he didn't know Wood's qualifications at that time. The General Counsel pointed out to him that after January 22, Ward was registered with the Union. To this Hamilton replied that he did not know that Ward had those special skills at that time. At this point he was asked why he hadn't dispatched a man until February 12, and he again replied that he had no man with the necessary qualifications. The wit-

ness then testified that he must have learned that Ward had the skills sometime prior to February 12, 1960, when he dispatched Ward to the job.

Hamilton then confirmed Shulz's testimony that about two weeks after the dispatch of Ward, Shulz called again and asked that another man with special skills be dispatched to the job. The witness then agreed with the questioner that he did not dispatch a man to the job until March 18, 1960, when he dispatched Wheeler. When asked why he didn't send a man out during that period he replied that he had no man with the required qualifications. When he was reminded that he had Jack Wood, the Charging Party, he replied that Jack Wood at that time was assigned to Group 4. This answer I cannot accept, for at this time when Wood was the only special skills man on the entire list, the group in which he was listed, was irrelevant. It was then pointed out to Hamilton that he waited three weeks. He answered that it appeared to him that Shulz was using this special skills routine to bypass the referral system.[2] The witness concluded his examination by admitting that no one has been sent to Shulz since May 3, 1960, although Wood was still available on the Union out-of-work list. The witness also admitted that all five men dispatched to the job with Shulz, were men who were not at the top of the list, but were dispatched as special skills men.

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[2]See testimony of Hamilton, transcript pages 144 et seq.

The appeals of Wood

On two occasions Wood availed himself of the appeal procedures set forth in the contract to seek a review of Hamilton's treatment of him. On the first occasion he appealed Hamilton's decision to put him in Group 4. The three-man Appeals Committee found that Wood was properly placed in Group 4.

On March 18, 1960, Wood again appealed on the dispatch of Wheeler to the Walsh job, instead of himself. The minutes of this meeting of the Appeals Committee are quite enlightening. They establish that Hamilton knew of Wood's special qualifications, and that Shulz wanted Wood dispatched to the job. However, the decision of the committee stated that at a meeting at Yuba City, "all dispatch books of Chico were thoroughly examined and B. A. Hamilton questioned about the same," and that the committee "feels the Complainant has been referred from Group 4 without discrimination."

It is worthy of note that Wood was not invited to attend or give evidence as to his side of the controversy. Upon the facts disclosed in this record, I find that the Appeals Committee in the cases of Wood at least, was a rubber stamp for the conduct of the Union's business agent and afforded Wood no opportunity to be heard, and offered him no genuine review of the facts of his appeal. On that basis, I reject, the Union's argument that the decisions of the Appeals Committee have any standing before the Board.

Concluding Findings

It is abundantly clear from the testimony of Shulz, whom I deem a reliable witness, that the Walsh Construction Company at its Oroville yard performs work on the repair and maintenance of mine locomotives, heavy-duty batteries and other electrical tunnelling equipment. The nature of this electrical work is distinctly different from that performed by "inside and outside wiremen," who install and repair electrical wiring in industrial, commercial and residential structures. Apparently the International Union recognizes this difference in functions and skills, for it has "railroad" locals, and "wireman's" locals, and experience in one field is not accepted as qualifying experience in the other. Furthermore, the contract between the parties recognizes a need for some flexibility in obtaining men with special skills, and for that reason the mechanics by which employers can obtain men with special skills is spelled out in the contract. Upon all the evidence on this point, I find that the company needed men with the special skills enumerated and that its continuing request for such men was bona fide in all respects.

It is equally clear, from his long history of employment, and from the fact that he had been employed in the Oroville yard for over a year on a previous occasion, that Wood possessed the special skills requested by Shulz.

It is also clear, especially from the testimony of Hamilton that except for Ward, Wheeler and

Wood, all former employees of Walsh, that the Union did not have on its out of work lists in any group, men with the required skills. Hamilton admitted this, in explaining the long delays which occurred between the dispatch of the various men. Why then was Wood refused the dispatch to which he was entitled?

On this point I cannot accept the testimony of either Campbell or Hamilton. They claimed that they felt aggrieved at, and were suspicious of Shulz, because of three factors. One: Shulz had his son employed at the yard, and they suspected he was doing electrical work, but the record is barren of any action that either Hamilton or Campbell took against Shulz in this regard. Two: they suspected that Shulz's request for men with special skills was a subterfuge to avoid the referral procedure. Yet, after Hamilton and Campbell discussed the situation with Shulz, Campbell agreed to try to find a man with the special skills for Shulz, and Hamilton dispatched McAdams to the job thereafter. Third: Hamilton and Campbell felt that Shulz was using pressure to get Wood. This statement is inconsistent with the conduct of the Union, in the dispatch of Ward, Shulz's son-in-law, who was requested by name by Shulz, and dispatched to the job by Hamilton. In the light of all the evidence, I must reject the testimony of Campbell and Hamilton on this point, as being entirely unpersuasive. I deem it a rather flimsy screen behind which the Union hopes to hide its patent discrimination against Wood.

Upon a review of the evidence, I find that prior to the dispatch of Ward, on February 12, 1960, Hamilton was fully aware (1) that Shulz wanted a man with special skills, and (2) that Wood, who had been registered since December 23, 1959, possessed those special skills. At that point, Wood was entitled to be dispatched to the job, and when he was not so dispatched, the discrimination against him became effective. The purpose of this discrimination is fairly obvious. Hamilton desired to prefer members of his own local, or other sister "wiremans" locals, over Wood whom he considered a newcomer, from a railroad local. Hamilton very readily dispatched Olds, Ward, Wheeler, Wing and McAdam, over a five-month period. These were wiremen from Hamilton's own local, or a sister wiremen's local, but he would not dispatch Wood, the newcomer from a railroad local.

IV. The effect of the unfair labor practices upon commerce.

The activities of the Union set forth in Section III above, occurring in connection with the operations of the Company described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Union has engaged in unfair labor practices within the meaning of Section

8(b)(1)(A) and Section 8(b)(2) of the amended Act, the undersigned will recommend that it cease and desist therefrom and take certain affirmative action in order to effectuate the policies of the amended Act.

Having found that in violating Sections 8(b)(1)(A) and 8(b)(2) of the Act, the Union has deprived Jack L. Wood of employment by Walsh Construction Company, it will be recommended that (1) the Union notify Walsh Construction Company, in writing, and furnish a copy of said notification to Wood, that it has withdrawn its objections to the employment of Wood at the Company's shop at Oroville, California, and request the Company to offer Wood employment at that plant; and (2) that the Union make Wood whole for any loss of pay he may have suffered by reason of the Union preventing his employment by the Company from February 12, 1960, to the date of the Union's notification to the Company, as set forth above, according to the following formula: Wood's loss of pay shall be computed on the basis of each separate calendar quarter, or portion thereof, from February 12, 1960, to the date on which the Union serves its notice upon the Company of its withdrawal of objection to Wood's employment; the quarterly periods, hereinafter called quarters, shall begin with the first day of January, April, July, and October. Loss of pay shall be determined by deducting from a sum equal to that which Wood would normally have earned for each such quarter or portion thereof, his net

earnings,[3] if any, in any other employment during the period. Earnings of one particular quarter shall have no effect upon the Union's liability for any other quarter.

Upon the above findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. Walsh Construction Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent, International Brotherhood of Electrical Workers, Local Union 340, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, the Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the amended Act.

4. By causing Walsh Construction Company, an employer, to discriminate against an employee in violation of Section 8(a)(3) of the amended Act, the Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(2) of the amended Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the

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[3]See Crossett Lumber Company, 8 NLRB 440; Republic Steel Corporation v. N. L. R. B., 311 U. S. 7; F. W. Woolworth Company, 90 NLRB 289.

meaning of Section 2(6) and (7) of the amended Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, I recommend that International Brotherhood of Electrical Workers, Local Union 340, AFL-CIO, its officers and agents, shall:

1. Cease and desist from:

(a) Restraining or coercing employees or prospective employees of Walsh Construction Company, its successors or assigns, in the exercise of their right to engage in, or to refrain from engaging in, any and all of the concerted activities listed in Section 7 of the Act, except to the extent that such right may be affected by the proviso in Section 8(b)(1)(A) of the Act, or by any agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act;

(b) In any other manner causing or attempting to cause Walsh Construction Company, its successors or assigns, to discriminate against employees or prospective employees in violation of Section 8(a)(3) of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Notify Walsh Construction Company, in writing, and furnish a copy to Jack L. Wood that the Union has no objection to the employment of Wood as electrician at the Oroville, California, shop of the Company without regard to his membership

or nonmembership in the Union, or any other labor organization, and without prejudice to his seniority, or other rights and privileges; said notification shall contain a request that Walsh Construction Company offer Wood employment as an electrician, as aforesaid;

(b) Make whole Jack L. Wood for any loss of pay he may have suffered as a result of the discrimination against him in the manner set forth in the section of this Intermediate Report and Recommended Order entitled "The remedy";

(c) Post in conspicuous places at the business office of the Union, and at the Oroville yard of the Company, in all places where notices of communications to its members or employees of the Company are customarily posted, copies of the notice attached hereto, marked Appendix A. Copies of the said notice, to be furnished by the Regional Director for the 20th Region, shall, after being duly signed by the Union's representative, be posted by the Union immediately upon receipt thereof and maintained for a period of sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Union to insure that such notices are not altered, defaced, or covered by any other material;

(d) Mail to the Regional Director for the Twentieth Region signed copies of the notice attached hereto as Appendix A for posting, as described in paragraph (c) above. Copies of said notices, to be furnished by the Regional Director for the Twentieth Region, shall, after being signed as provided

in paragraph 2(c) be forthwith returned to the Regional Director for said posting;

(e) Notify the Regional Director for the Twentieth Region, in writing, within twenty (20) days from the receipt of this Intermediate Report and Recommended Order what steps the Union has taken to comply herewith.

It is further recommended that unless on or before twenty (20) days from the date of receipt of this Intermediate Report and Recommended Order the Union notifies the said Regional Director, in writing, that it will comply with the above recommendations, the National Labor Relations Board issue an order requiring it to take such action.

Dated: 10/25/60.

/s/ DAVID F. DOYLE,
Trial Examiner.

Appendix A

Notice to All Members of International Brotherhood of Electrical Workers, Local Union 340, AFL-CIO, and to All Employees and Prospective Employees of Walsh Construction Company

Pursuant to

The Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our members and the employees of Walsh Construction Company that:

We Will Not cause or attempt to cause any employer to discriminate against employees in regard to their hire or tenure of employment or any term or condition of employment in violation of Section 8(a)(3) of the Act, as amended.

We Will Not, in any manner, restrain or coerce employees of any employer in the exercise of rights guaranteed them in Section 7 of the Act, except to the extent that such right may be affected by a lawful agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as amended.

We Will notify Walsh Construction Company and Jack L. Wood that we withdraw our objections to the employment of Wood by that Company, and request said Company to offer employment to Wood as an electrician at its Oroville yard.

We Will make Jack L. Wood whole for any loss of pay suffered because of our discrimination against him.

Dated.....

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 340, AFL-CIO

(Labor Organization)

By.....,

(Representative) (Title).

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

United States of America
Before the National Labor Relations Board

Case No. 20-CB-760

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 340, AFL-CIO (WALSH CONSTRUCTION COMPANY)

and

JACK L. WOOD, an Individual

DECISION AND ORDER

On October 25, 1960, Trial Examiner David F. Doyle issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. The Respondent filed exceptions to the Intermediate Report, together with a supporting brief.

The Board has reviewed the rulings of the Trial Examiner made at the hearing, and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record, and hereby adopts the findings, conclusions and recommendations of the Trial Examiner, with the following additions and modifications:

1. We agree with the Trial Examiner's conclusion that Local 340, the Respondent, refused to refer to Jack L. Wood, the Charging Party, for employment at Walsh Construction Company for reasons related to his lack of membership in Local 340. Local 340 is an "inside and outside wireman's" local whose members are primarily skilled in the installation and maintenance of wiring used in construction. It has a contract with Sacramento Valley Chapter, National Electrical Contractors Association, to which Walsh was a party. Local 340 was the exclusive hiring agent under the agreement.[1] Although Walsh uses men in its tunnel construction jobs who are skilled in wiring installations, it also requires electricians, at its Oroville Yard, who are experienced in the repair of mine locomotives, battery switch gears, large DC batteries and transformers. Wood was a member of Local 800, IBEW, whose members were electricians primarily skilled in the maintenance of locomotives and other heavy equipment.

Since Wood did not have the requisite wireman's experience, he had been rated by Local 340 in one of the low seniority groups provided for by the contract. The contract, however, also contained a "special skills" provision, whereby Local 340 agreed to refer men outside of the regular seniority system to

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[1]The General Counsel concedes that the hiring arrangement set out in the agreement conforms to the standards of Mountain Pacific Chapter of the Associated General Contractors, 119 NLRB 1733.

an employer who requested an electrician with skills other than those normally possessed by Local 340 members.

In affirming the Trial Examiner's conclusion that the refusal of Local 340 to refer Wood was based on reasons relating to union membership, we rely on the grounds cited by the Trial Examiner as well as on certain additional background evidence which was not referred to in the Intermediate Report.[2] Thus, in December 1958, Wood was out of work and contacted Respondent's hiring hall in Sacramento. Campbell, Respondent's business manager, asked Wood what local he was from. When Wood told him it was Local 800, Campbell replied "That is bad" and stated that Wood should not work in a construction local such as Local 340.

In November, 1959, Wood was working on a tunnel job for another contractor within Respondent's jurisdictional area. During a dispute between Wood and one of Respondent's business representatives, Galvin, the latter told Wood "why don't you go back to where you came from?" Galvin also said that it was his job to protect the members of Local 340. During this job, as noted in the Intermediate

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[2]Some of these incidents, upon which we rely as background evidence, occurred prior to the six-month period preceding the filing and service of the charge herein. It is, however, considered insofar as it sheds light on Respondent's later conduct, within the Section 10(b) period, in refusing to refer Wood. Murfreesboro Pure Milk Co., 127 NLRB No. 140.

Report, Wood's traveling card from Local 800 was rejected by Respondent without explanation.

In January, 1960, Wood, on his own initiative, took the examination set by Local 340 in order to qualify himself for a higher grouping under the seniority classification system set forth in Respondent's hiring agreement. He was never notified of the results of this test as he was not deemed eligible to take the examination, according to Campbell. Work under a railroad local's jurisdiction was not considered to be relevant experience for classification under Local 340's contract.

At the hearing, in explaining Respondent's referral practices, Hamilton, one of Respondent's business agents, testified that "ours is strictly what we call an inside local, inside and linemen local, and if we refer someone that isn't a member of our branch of the labor market, they are out of classification." At another point in the hearing, business manager Campbell conceded that "although we have an agreement with this company (Walsh), it is the type of a company that we seldom have agreements with. It is a general contractors, and our contracts under the construction type of work is almost exclusively with electrical contractors." Campbell pointed out that Respondent did not have many members who had the special lead burning and mine locomotive skills requested by Walsh.

Although Respondent claims it did not dispatch Wood because it did not believe Walsh actually needed men with special skills, we find that a pre-

ponderance of the evidence, as outlined in the Intermdiate Report and supplemented above, supports the General Counsel's position that Wood was in fact refused referral by Respondent because of his membership in a "railroad" rather than a "wireman's" local, and not for the reasons advanced by Respondent. Accordingly, we find a violation of Sections 8(b)(1)(A) and 8(b)(2), as alleged in the complaint.

2. Like the Trial Examiner, we cannot, in the circumstances of this case, honor the decision of the appeals committee, established under the parties' agreement, which found no merit in Wood's complaint that Local 340 had improperly refused to refer him to the Walsh job. At the appeals hearing held April 5, 1960, to which Wood was not invited, members of the appeals committee were primarily concerned with whether Wood had shown proof of his qualifications for the Walsh job. It is not clear from the minutes of the meeting[3] whether the committee was considering Wood's qualifications under the group classification system, or his "special skills" qualifications. If the former, as appears probable from other evidence in the record, that issue is not involved in this case. If the latter, Respondent concedes that Wood possessed the "special skills" requested by Walsh, and it is clear that Wood's special skills were known to Respondent no later than February 12, 1960, the first date of dis-

[3]Minutes of the meeting, in the form of a partial transcript, are in evidence as an exhibit.

crimination found by the Trial Examiner.[4] As it is evident that Wood's claim for referral as a "special skills" man was not fully considered by the appeals committee, and as Wood's present contention that he was denied referral because of his membership in a "railroad" local was not raised there, we cannot give weight to its determination.[5]

Order

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, International Brotherhood of Electrical Workers, Local Union 340, AFL-CIO, its officers and agents, shall:

1. Cease and desist from:

(a) Causing or attempting to cause Walsh Construction Company to discriminate against Jack L. Wood, or any other employee or applicant for em-

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[4]Although the evidence clearly establishes such knowledge by Respondent, the minutes disclose that Hamilton told the committee he did not know of Wood's qualifications. We therefore do not adopt the Trial Examiner's statement indicating that the minutes "establish that Hamilton knew of Wood's special qualifications."

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[5]See Monsanto Chemical Co., 130 NLRB No. 119. Although we accord no binding effect to the decision of the appeals committee, we find the evidence insufficient to establish that the committee was a "rubber stamp" for the business agent's conduct, and do not adopt this statement of the Trial Examiner.

ployment, in violation of Section 8(a)(3) of the Act, as amended;

(b) In any like or related manner restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act, as amended.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Notify Walsh Construction Company, in writing, and furnish a copy to Jack L. Wood, that Respondent has no objection to Wood's employment at the Company's Oroville, California, yard and shop;

(b) Make whole Jack L. Wood for any loss of pay he may have suffered as a result of the discrimination against him, in the manner set forth in the section of the Intermediate Report entitled "The remedy";

(c) Post at Respondent's offices and meeting halls copies of the notice attached hereto and marked "Appendix."[6] Copies of such notice, to be

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[6]In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order," the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by an authorized representative of Respondent, be posted immediately upon receipt thereof, and be maintained by it for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(d) Promptly mail to said Regional Director signed copies of the Appendix for posting, the Company willing, at the Company's Oroville yard and shop;

(d) Notify the Regional Director for the Twentieth Region, in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., April 26, 1961.

FRANK W. McCULLOCH,
Chairman;

BOYD LEEDOM,
Member;

JOHN H. FANNING,
Member, National Labor Relations Board.

Appendix

Notice to All Members of International Brotherhood of Electrical Workers, Local Union 340, AFL-CIO, and to All Employees and Prospective Employees of Walsh Construction Company

Pursuant to a Decisions
and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not cause or attempt to cause Walsh Construction Company to discriminate against Jack L. Wood, or any other employee or applicant for employment, in violation of Section 8(a)(3) of the Act, as amended.

We Will Not, in any like or related manner, restrain or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8(a)(3) of the Act, as amended.

We Will notify Walsh Construction Company, in writing, and will furnish a copy to Jack L. Wood, that we have no objection to Wood's employment at the Company's Oroville, California, yard and shop.

We Will make whole Jack L. Wood for any loss of pay he may have suffered as a result of our discrimination against him.

Dated.....

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 340, AFL-CIO,

(Labor Organization).

By.....

(Representative) (Title).

This notice must remain posted for 60 consecutive days from the date hereof, and must not be altered, defaced or covered by any other material.

Before the National Labor Relations Board
Twentieth Region

Case No. 20-CB-760

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 340, AFL-CIO,

and

JACK L. WOOD, an Individual

Before: David F. Doyle, Trial Examiner.

PROCEEDINGS
San Francisco, California,
Tuesday, June 21, 1960

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock a.m.

Appearances:

PHILIP PAUL BOWE, ESQ.,
Appearing on behalf of the General Counsel, National Labor Relations Board.

BRUNDAGE, NEYHART, GRODIN & MILLER, by
JOSEPH R. GRODIN, ESQ.,
Appearing on behalf of I.B.E.W., Local No. 340, AFL-CIO.

* * *

Mr. Bowe: At this time I would like to offer for the record my understanding of an oral stipulation concerning jurisdiction which it is my understanding Respondent will agree to.

This stipulation is as follows:

Walsh Construction Company, herein called the Employer, is now and has been at all times material herein an Iowa corporation with its main office located in Davenport, Iowa. It is engaged in the business of general contracting.

During the calendar year ending December 31, 1959, the Employer in the course of its business operations performed services valued in excess of $50,000.00 in states other than the State of Iowa wherein the Employer is located and has its principal place of business.

The Employer is engaged in commerce and operations affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Trial Examiner: Do you accept the stipulation?

Mr. Grodin: So stipulated.

Mr. Bowe: At this time I would like to offer in evidence by stipulation a copy of the 1959 and 1961 collective [6*] bargaining agreement between Local 340 of the International Brotherhood of Electrical Workers and the Sacramento Valley Chapter of the National Electrical Contractors Association with the stipulation that Mr. Grodin is agreeable that this is a true and accurate copy of such contract and the contract is referred to in the General Counsel's Complaint in a paragraph which is admitted in Respondent's Answer.

Mr. Grodin: So stipulated.

Trial Examiner: The stipulation is accepted, and pursuant to the stipulation the contract is admitted in evidence and we shall assign that, what number?

Mr. Bowe: General Counsel's No. 2.

Trial Examiner: General Counsel's No. 2, the agreement mentioned is received in evidence.

(Whereupon, the document above referred to was marked General Counsel's Exhibit No. 2 for identification and received in evidence.) [7]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

GENERAL COUNSEL'S EXHIBIT No. 2

* * *

Central Headquarters

W. J. Campbell, Business Manager
Local Union 340
International Brotherhood of Electrical Workers
5841 Newman Court, Sacramento, California
Phone: GLadstone 5-2613

Joseph T. Krivanek, Business Manager
Sacramento Valley Chapter
National Electrical Contractors Association, Inc.
5300 Elvas Avenue, Sacramento, California
Phone: GLadstone 2-3528

Dispatching Offices

Sacramento

Mon., 8-12 A.M.—Tues., 8-10 A.M.—Wed., 8-10 A.M.
Thurs., 8-10 A.M.—Fri., 8-10 A.M. and 3-5 P.M.

5841 Newman Court. GLadstone 5-2613

Marysville

Tues., 8-9 A.M.—Thurs., 8-9 A.M. and 4-5 P.M.
SHerwood 2-5750

Chico

Mon., 8-9 A.M.—Wed., 8-9 A.M.
Fri., 8-9 A.M. and 4-5 P.M.

210 W. 6th Street. Fireside 2-3877

General Counsel's Exhibit No. 2—(Continued)

Redding

Mon., 8-9 A.M.—Tues., 8-9 A.M.—Wed., 8-9 A.M.
Thurs., 8-9 A.M.—Fri., 8-9 A.M. and 4-5 P.M.

1310 California Street. Chestnut 1-2468

Article IX

Referral Procedure

Introduction

Section 1. In the interest of maintaining an efficient system of production in the industry, providing for an orderly procedure of referral of applicants for employment, preserving the legitimate interests of the employees in their employment status within the area, and of preventing discrimination in employment because of membership or non-membership in the union, the parties hereto agree to the following system of qualifying and referring applicants for employment.

Section 1a. The Union shall be the sole and exclusive source of referrals of applicants for employment.

Section 1b. The Employer shall have the right to reject any applicant for employment.

Section 1c. The Union shall select and refer applicants for employment without discrimination against such applicants by reason of membership

General Counsel's Exhibit No. 2—(Continued)

or non-membership in the union and such selection and referral shall not be affected in any way by rules, regulations, bylaws, constitutional provisions or any other aspect or obligation of union membership policies or requirements. All such selection and referral shall be in accordance with the following procedure.

Section 2. Group Classification. The Union shall maintain a register of applicants for referral established on the basis of the groups listed below. Each applicant shall be registered in the highest priority group for which he qualifies.

Section 2a. Group 1. All applicants for referral who have proof of (1) forty-eight months or more of experience on the types of work covered by this Agreement; (2) have passed an examination, as defined below; (3) are residents of the geographical areas constituting the normal construction labor market as defined below; and (4) have been employed under a collective bargaining agreement between the parties to this agreement for a period of at least twelve months during the forty-eight months preceding registration.

Section 2b. Group 2. All applicants for referral who have proof of (1) forty-eight or more months experience on the types of work covered by this Agreement, as defined below; (2) have passed an examination, as defined below; (3) are residents of the areas surrounding the normal construction labor market as defined below; and (4) have been em-

General Counsel's Exhibit No. 2—(Continued)

ployed for a period of at least 12 months in the forty-eight months preceding registration under a collective bargaining agreement between parties to an Agreement in their respective areas.

Section 2c. Group 3. All applicants for referral who have proof of (1) forty-eight or more months' experience on the types of work covered by this Agreement and (2) have passed an examination, as defined below.

Section 2d. Group 4. All applicants for referral who have proof of (1) twenty-four or more months' experience on the types of work covered by this Agreement; (2) are residents of the geographical area constituting the normal construction labor market as defined below; and (3) who have been employed at least six months in the twenty-four months preceding registration under a collective bargaining Agreement between the parties to this agreement.

Section 2e. Group 5. All applicants for referral who have proof of twelve or more months' experience on the types of work covered by this Agreement.

Section 3. If the registration list is exhausted and the Union is unable to refer applicants for employment to the Employer within forty-eight hours from the time of receiving the Employer's request, Saturday, Sunday, and holidays excepted, the Employer shall be free to secure employees at

General Counsel's Exhibit No. 2—(Continued)

wages and conditions shown in the Agreement without using the referral procedure, but such employees, if hired, shall have the status of "temporary employees." The employer shall notify the Business Manager within twenty-four hours of the names and Social Security numbers of such temporary employees.

Any temporary employee hired by the Employer for work of the types covered by this Agreement shall be replaced within twenty-four hours after the Employer has received notice from the Union that an applicant is available in groups one to five, inclusive, and such employee shall be paid at the rate specified in the Agreement for the class of work done. Proof of such payment shall be furnished by the Employer upon demand.

Section 4. Registration Procedures. Any person who by their own admission cannot meet the requirements of the trade as set forth in the Agreement between Local No. 340, IBEW, and the Sacramento Valley Chapter, NECA, shall not be registered or given an examination.

Section 4a. The records for referral shall be kept available for inspection.

Section 4b. Employers shall advise the Business Manager of the Local Union of the number and classification of applicants needed. The Business Manager shall then refer applicants to the employers as described herein.

General Counsel's Exhibit No. 2—(Continued)

Section 4c. Applicants' names will be placed on the referral list in the order in which they register their availability for work. Persons in Group 1 shall be referred first, in that order, and the same procedure shall be followed successively for Groups 2, 3, 4 and 5, subject to the following qualification:

When the Employer states bona fide requirements for special skills and abilities in his requests for applicants, the Business Manager shall refer the first applicant on the referral list possessing such skills and abilities.

The Business Manager, when referring applicants with special skills shall take into consideration the applicant's own estimate of his ability to perform the work requiring such special skills, the applicant's record of experience on such work and the Business Manager's knowledge, if any, of the estimate which contractors have made of the applicant's skills and abilities to perform such work.

Section 4d. Decisions of the Business Manager in referring applicants are appealable to the Appeals Committee as herein provided. Such appeals shall be made within forty-eight hours and a decision of the Appeals Committee shall be rendered within one week after receipt of the appeal by the Committee. Forms will be provided at the dispatch office for appeals.

* * *

Received in evidence June 21, 1960.

* * *

Mr. Bowe: Mr. Grodin, will you consider this stipulation, that on December 23rd, 1959, Mr. Wood registered on the out-of-work list at the Chico hall of Local 340, and was placed on the No. 3 out-of-work book?

Mr. Grodin: Yes, with this qualification, when you say he was placed on the No. 3 book, it implies that he was directed to register in that book. I am not sure whether he was, but I will stipulate that he did register on the group 3 list which is in the same book as the group 4 list.

Trial Examiner: All right; is that satisfactory?

Mr. Bowe: That is satisfactory.

Trial Examiner: The stipulation is accepted.

Mr. Bowe: That on January 22nd, 1960, a Mr. Ward, W-a-r-d, Mr. Merridth Ward, registered at the Chico hall, on January 22nd, 1960, in the No. 4 book. [18]

* * *

Mr. Bowe: All right.

That on February 5, 1960, Mr. Wood was changed from the group 3 book to the group 4 book, again no connotation meant from the word "changed," just the fact that it occurred on this date.

Mr. Grodin: On February 5th, 1960, he registered his name in the group 4 book.

Mr. Bowe: All right.

Trial Examiner: All right, the stipulation is accepted.

Mr. Bowe: That on February 5, 1960, a Mr. Olds, O-l-d-s, Arnold Olds, registered in group 1 and that on that same date he was referred by the Union to the Walsh job in question.

Mr. Grodin: Yes, we will so stipulate.

Trial Examiner: The stipulation is accepted.

Mr. Bowe: That on February 12, 1960, Mr. Merridth Ward was dispatched to the Walsh job and hired, actually.

Mr. Grodin: Yes, so stipulated.

Mr. Bowe: And going back to Mr. Olds, to complete that stipulation, he was not hired.

Mr. Grodin: That is correct.

Trial Examiner: The stipulation is accepted.

Mr. Bowe: That on March 11th, 1960, a Mr. Wheeler, Mr. W. Wheeler, registered in the group 1 book, that on [19] March 18, 1960, Mr. Wheeler was referred to the Walsh job and was hired; that on March 28, 1960, a Mr. Wing, W-i-n-g, Mr. Charles Wing, registered in group 1.

Mr. Grodin: You are going too fast.

Mr. Bowe: I am sorry.

Mr. Grodin: Would you repeat that last——

Mr. Bowe: That on March 28, 1960, a Mr. Charles Wing, W-i-n-g, registered in group 1.

Mr. Grodin: Yes.

Mr. Bowe: That on April 22nd, 1960, Mr. Wing was sent out to the Walsh job, worked a day and a half, and then was rejected.

Trial Examiner: Is that correct?

Mr. Grodin: Well, we don't know how long he worked but we know he was sent out there on that day.

Trial Examiner: The stipulation is accepted with that statement of Mr. Grodin's. [20]

* * *

Mr. Bowe: Therefore, I would like to change the stipulation to the effect that on May 2nd, 1960, Mr. McAdams registered and was referred from the Union hall, that on May 3rd, 1960, he appeared on the job site and was rejected by Mr. Shulz.

Trial Examiner: All right, the stipulation is accepted. [21]

* * *

RUDOLPH C. SHULZ

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

Trial Examiner: Mr. Shulz, will you speak up? This room is a little bit quiet now, but usually it is pretty noisy from that street out there and we will have some trucks going by and the first thing you know none of us can hear what is going on. [22]

* * *

Direct Examination

By Mr. Bowe:

Q. Did I spell your name correctly, Mr. Shulz?
A. S-h-u-l-z.
Q. Are you employed, Mr. Shulz?
A. I am.
Q. With whom?

(Testimony of Rudolph C. Shulz.)

A. Walsh Construction Company.

Q. What is your job, sir?

A. I am an electrical superintendent in charge of all electrical work on the West Coast.

Trial Examiner: Now, didn't we get this witness' first name?

The Reporter: Yes, sir.

Trial Examiner: All right.

Q. (By Mr. Bowe): What type of work is done by Walsh Construction Company?

A. Well, Walsh Construction Company do all types of heavy construction such as bridges and large buildings and industrial plants and power houses and numerous other heavy construction [23] jobs.

* * *

A. Well, the electrical shop in Oroville is for the prime reason of storing all types of equipment that has to be repaired between jobs or during job construction. We have a large machine shop and electrical shop. We are doing the construction, period, on various outlying jobs. The major repair work is done in the Oroville yard and we repair all types of locomotives and batter—battery switch gears and line hoists and transformers, everything that pertains to this heavy construction work, including all mechanical work.

Q. Do you do the mechanical work or does the machine shop [24] do that?

A. The mechanical work comes under the me-

(Testimony of Rudolph C. Shulz.)

chanical superintendent. The only mechanical work that I have to do which actually involves electrical work.

Q. When you get a new contract to do a general construction job does this necessitate any work at the shop?

A. It does. It required a good deal of repair work, all the used equipment which is stored in the yard must be completely reconditioned and gotten ready to send out on a new job so that we don't have a lot of repair or delay on the job. [25]

* * *

Mr. Bowe: Well, didn't—or, couldn't I have a stipulation from you to the general effect that an employer can refer a man from one job to the other without sending him back to the hall as a general practice?

Mr. Grodin: Well, as a general practice, the answer is [26] no. If the jobs are so different as to undermine the original basis upon which the man was referred, that is, if the man is referred out of order on the basis of some special skill, but the special skill is either necessary only for a very brief period or is illusory for the purpose of getting the man on other work which a man higher up on the list would otherwise be referred to, then the answer is no.

Mr. Bowe: But other than that, an employer could switch men from job to job without referring them back to the hall?

(Testimony of Rudolph C. Shulz.)

Mr. Grodin: Subject to the qualifications that I mentioned.

Mr. Bowe: Yes.

* * *

Q. (By Mr. Bowe): What type of skills, if any, are [27] required for work in your electrical shop in Oroville, in your opinion?

A. Well, I do a lot of DC motor work and I do a lot of battery repair work; we have about $150,000.00 worth of storage batteries in our Oroville yard at the present time which must be maintained and repaired, and, of course, to do that the man must have—be able to do some lead burning. He has to know how to take these cells apart and replace separators or whatever may be necessary and, of course, our locomotives are DC battery operated locomotives; they have to be stripped right down to the bare iron and completely reconditioned and assembled and gotten ready for a new job.

Q. Would you describe what one of these batteries physically look like and the size of it?

A. Well, these batteries, the larger ones, are about ten feet long and about five feet wide, and weight about eight ton, and are valued at about $9,000.00 each.

Q. In your opinion, Mr. Shulz, can an average journeyman electrician, would he possess the skill?

A. No, he would not. [28]

* * *

(Testimony of Rudolph C. Shulz.)

Q. Now, when you hire people for the shop, you get them out of what hall? A. Chico.

Q. That is Chico hall of 340? A. Yes.

Q. Why did you get the tunnel men, or request for tunnel [31] men from the Sacramento hall of 340?

A. Well, it was the nearest to the job, nearest office to the job.

Q. In requesting these tunnel electricians, did you request any special skills when you requested the men from Local 340?

A. We made a request for an electrican that had some tunnel experience.

Q. And how many men were sent out in answer to this request from 340?

A. There were three sent out and I sent one back.

Q. Why did you send that one back?

A. Well, he was sixty-one years of age and he wasn't agile enough for this type of hazardous construction and he didn't seem to understand too much about the work.

Q. Did you interview the other two as to their past experience in tunnel work when you hired them? A. I did.

Q. Now, as of January 1, 1960, how many electricians did you have working in your shop in Oroville?

A. January 1, I believe, I had one electrician.

Q. And who was that?

A. Robert Shulz.

(Testimony of Rudolph C. Shulz.)

Q. Is he any relation to you?

A. He is my son. [32]

Q. How soon after that date did you need another man if you did need another man?

A. I believe somewhere along the 15th of January I called for another man.

Q. Who did you call?

A. I called Mr. Hamilton.

Q. Who is Mr. Hamilton?

A. Mr. Hamilton is the business agent for Local 340 in the Chico area.

Q. And tell me the conversation that took place between you and Mr. Hamilton at this date.

A. Well, I told him that Mr. Ward had returned from the job that he had in Nevada and I'd like to have him cleared for this work in the shop. [33]

* * *

Q. Did you make any request for another man other than Mr. Ward in this first conversation?

A. I believe I did mention Mr. Ward.

Q. Did you make any request, not by name, for a man just possessing these skills?

A. Well, yes.

Q. Well, tell me what you said.

A. I told him I was in need of a man that could repair batteries, repair these DC locomotives, and charging sets, and do some setting and some welding and some lead burning and so on.

Q. And what did he reply?

(Testimony of Rudolph C. Shulz.)

A. He said he would find me someone with those skills.

Q. And this was about January 15th of 1960?

A. I believe it was about then.

Q. Is Mr. Ward any relation to you?

A. Mr. Ward is my son-in-law.

Q. Your son-in-law. Has he worked for the Walsh Construction Company before?

A. He has worked for the Walsh Construction Company about eleven or twelve years.

Q. Approximately how much of that time was in the Oroville shop? [34]

A. That is hard to say, possibly, oh, maybe a year or a year and a half between jobs.

Q. Now, to get this time sequence straight in your mind, the first call you have testified was about January 15, 1960.

You heard the stipulation to the effect that Mr. Ward actually registered in the Union hall about January 22nd, 1960? A. Yes.

Q. Now, what happened next in connection with this job?

A. Well, they sent a man out, I believe, by the name of Mr. Olds.

Q. And this was approximately when?

A. I would say it would be the early part of February, maybe the first week in February.

Q. Now, between the time of the first telephone call and the time Mr. Olds was sent out on February 5, 1960, were there any more phone conversations between you and Mr. Shulz?

(Testimony of Rudolph C. Shulz.)

Trial Examiner: Mr. who?

The Witness: Pardon?

Q. (By Mr. Bowe): Between you and Mr. Hamilton.

A. Yes, I believe I called him again and made some mention that he had a Mr. Wood up there that had worked for the Company in the past and I felt that he was qualified to fill this job. [35]

Q. What, if anything, was Mr. Hamilton's response? A. I don't remember.

Q. Mr. Olds came out to the job on February 5, 1960. Was he hired?

A. No, he was not. I interviewed the man and by his own admission he wasn't qualified to fill the job; so I sent him back to the Union hall.

* * *

Q. After you rejected Mr. Olds, what happened next?

A. I believe Mr. Ward was cleared then. [36]

* * *

Q. After February 12, 1960, what happened next in connection with this job?

A. I believe I called up and told Mr. Hamilton that——

Q. Approximately when did you call up Mr. Hamilton?

A. It was the 5th that Mr. Olds came out.

Q. The 5th of February that Mr. Olds came out. The 12th of February that Mr. Ward came out.

(Testimony of Rudolph C. Shulz.)

Now when was the next phone call?

A. Oh, approximately two weeks later.

Q. And, as well as you can remember, relate this phone [37] conversation for us, Mr. Shulz.

A. I told Mr. Hamilton I needed another electrician with the special skills that I had requested before.

Q. Was Mr. Wood mentioned in the phone conversation? A. I don't remember.

Q. But you do remember that he had been mentioned in an earlier conversation?

A. Absolutely right.

Q. What was Mr. Hamilton's response when you told him you needed another man with these special skills?

A. He said he would find me someone with those special skills.

Q. And what happened next after this phone conversation?

A. I believe it was two weeks elapsed and I think he sent out a man by the name of Mr. Wheeler then.

Q. You heard the stipulation that Mr. Wheeler arrived on March 18, 1960. Did anyone arrive with him on that date?

A. Mr. Hamilton and Mr. Wood.

Q. Relate what was said when the three men arrived on the job site.

A. Mr. Hamilton brought Mr. Wheeler in and introduced him, and Mr. Wheeler gave me a clearance to go to work, and I told him that if he wasn't

(Testimony of Rudolph C. Shulz.)

qualified to do the work, why, he could go down the road, but Mr. Wheeler had worked for the Walsh Company for some year or two previous and had [38] recollected that he had this necessary experience, so I thought he would be satisfactory; so I employed him.

Q. What do you mean by the phrase "go on down the road"?

A. He would be discharged.

Q. Was there any other conversation?

A. I believe Mr. Wood asked me if I needed another man.

Q. What did you answer?

A. I would like to correct that.

I believe he said did I have a request for another electrician.

Q. What did you answer? A. I said no.

Q. Were Mr. Hamilton and Mr. Wheeler present during this exchange between you and Mr. Wood? A. They were.

Q. How close were they?

A. Oh, four or five feet.

Q. Is Mr. Wheeler still working for you?

A. He is.

Q. What happened next in connection with this job after Mr. Wheeler was hired?

A. I believe about two weeks later I called Mr. Hamilton for another man.

Q. Did you make any reference to the special skills on this call? [39]

A. I did; I still needed men with the special

(Testimony of Rudolph C. Shulz.)

skills, as that was the only type of work that I had to do.

Q. Could you tell me again what those special skills were that you told Mr. Hamilton you needed?

A. I needed a man that knew DC locomotive repair, could repair locomotive batteries, and had some lead burning experience, and should be able to do some cutting and welding.

Q. And what did Mr. Hamilton reply this time?

A. He said he would find me someone with those special skills.

Q. Was Mr. Wood's name mentioned in this phone conversation?

A. I don't remember.

Q. What happened next?

A. I think there was about two weeks elapsed, and I think there was a man by the name of Mr. Wing was sent out.

Q. And the stipulation indicates that he was sent out on April 22nd, 1960. Did you interview him?

A. I interviewed him and I didn't think that he possessed the necessary skills, although I put him to work on a job of checking some batteries to be sure that he couldn't do the work.

He worked about four hours, or three hours, and he didn't seem to know what he was doing, so I went over to the office and made out a discharge slip and gave him the discharge slip at about, oh, 11:00 o'clock or something like [40] that, and he went over to the office, and the office had no blank

(Testimony of Rudolph C. Shulz.)

checks to pay him off, so I put him back to work, and at noon the next day I believe he was paid off.

Q. What happened next?

A. I called Mr. Hamilton and told him that——

Q. How soon after Mr. Wing was rejected?

A. Oh, possibly the next day.

Q. What was the conversation?

A. I told him I still needed an electrician to fill the job with the special skills. To the best of my knowledge, he said he would find me someone.

Q. What happened next?

A. I believe the next few days or a week Mr. Hamilton and Mr. Campbell——

Q. Who is Mr. Campbell?

A. Mr. Campbell is the business manager who was in charge of Local 340.

Q. All right; go ahead.

A. I believe they appeared with also the president of the local.

Q. At the shop?

A. Yes, and we went over into the office and they wanted to discuss about these men with these special skills; we had a little discussion, and I believe Mr. Campbell said he would find me someone with these special skills, and a few days [41] later, why, they sent me a man.

Q. And that, according to the stipulation, was on May 3rd, 1960, and Mr. McAdams; did you interview him? A. I did.

Q. Was he hired?

A. He was not; he didn't have the special skills.

(Testimony of Rudolph C. Shulz.)

I asked him a few simple questions about what takes place in a battery when it is charged and discharged, and he couldn't answer, and I gave him a simple wiring diagram of a locomotive and I asked him to tell me the sequence of operation, which he didn't know; so I felt that he wasn't qualified to do the work that I had to do, so I sent him back to the Union hall.

Q. And what happened next?

A. I believe that same afternoon, or that same day, I believe Mr. Hamilton called me and asked me if I was still in need of a man to do this work with these special skills.

Q. What did you reply? A. I said yes.

Q. Have you received any men from the Union hall since that day?

A. Not for employment in the Oroville yard.

Q. Are Wheeler, Ward and your son, Shulz, still working for the Company?

A. Yes. [42]

* * *

Cross-Examination

By Mr. Grodin: [45]

* * *

Q. While the job is in progress and you have built up the number of men in the shop to a sufficient number to take care of the equipment necessary for the job, do you sometimes then transfer

(Testimony of Rudolph C. Shulz.)

people from the shop to the job, even while it is in progress? A. I do.

Q. And, as I understand it, you never know from one day to the next when you are going to want to do that, is that correct? [46]

A. An emergency might arise on the job whereby I might have to take a man from the shop and send him to the job and then bring him back to the shop again, and——

Q. And that could happen any time?

A. It could.

Trial Examiner: May I interrupt a moment?

Now as far as any work which is done at the site of this tunnel, is it all repair work of these machines and batteries and so forth?

The Witness: I must have some men on the job which are capable of making these on-the-spot repairs.

Trial Examiner: That is what I meant; these men don't participate in the actual construction in any way, do they?

The Witness: Yes, they would have to do some of the actual construction, too.

Mr. Bowe: That is electrical construction?

The Witness: Electrical construction.

Trial Examiner: That is what I was getting at. Do they do anything like running power lines into this tunnel and maintaining them in there?

The Witness: They also do that, and if there is a failure on the locomotive or battery charger,

(Testimony of Rudolph C. Shulz.)

the man has to be capable of making the repair immediately.

Trial Examiner: All right.

Q. (By Mr. Grodin): Now, with respect to the test that you [47] gave Mr. McAdams when he was referred to you by the Union, you say that you gave him some wiring diagrams for the locomotives and asked him to tell you the sequence of operation.

Did you do that with other people who reported for work as well? A. I don't think so.

Q. How did you happen to do it with Mr. McAdams? A. I don't know. [48]

* * *

JACK L. WOOD

was called as a witness by and on behalf of the General Counsel, and, having been first duly sworn, was examined and testified as follows: [54]

Direct Examination

By Mr. Bowe:

* * *

Q. What is your occupation, Mr. Wood?

A. I am an electrician.

Q. When did you move to California?

A. In June of 1953.

Q. In what city were you employed before that?

A. In Laramie, Wyoming.

Q. What type of work did you do in Wyoming?

(Testimony of Jack L. Wood.)

A. For four years I was a mine electrician for the Union Pacific Coal Company.

Q. In the course of that job, what types of work did you do?

A. It consisted of mine locomotive repair.

Q. What type of locomotives are these?

A. They are direct current locomotives.

Q. When you worked in—before you came to California, were you a member of a labor organization?

A. I have been a member of the IBEW in Cheyenne, Wyoming.

Q. What was the local number? A. 775.

Q. What type of local is that?

A. It is a local that has jurisdiction over railroad electricians. [55]

Q. Where did you originally get your electrical experience?

A. I was in the Navy in the early 1940's, 1944 and '45, and during this time while I was in the Navy they sent me to an electrical training school at the University of Minnesota at Minneapolis, Minnesota, and after I received a diploma from that school I was a shipboard electrician and was discharged as an electrican's mate third class.

Q. Where were you first employed when you first moved to California?

A. I went to work for the Western Pacific Railroad Company at Oroville.

Q. What type of work were you doing for them?

A. I was an electrician for them.

(Testimony of Jack L. Wood.)

Q. In the course of that job, what type of work and what pieces of equipment did you work on?

A. I worked on diesel locomotives and shop equipment and at various times would put in a service or an outlet for a welder or portable equipment pump and so on.

Q. Were you a member of any labor organization while you held this job?

A. I joined Local Union No. 800 in Sacramento in July or August of 1953.

Trial Examiner: Local 800 of what union?

The Witness: IBEW.

Q. (By Mr. Bowe): What type of local is [56] this?

A. This is a railroad local, that is the local having jurisdiction over railroad electrical employees.

Q. Are you currently a member?

A. I am.

Q. What was your next job?

A. After leaving the railroad I went to work for the Walsh Construction Company in May of 1957.

Q. How long did you continue on this job?

A. Approximately eighteen or nineteen months.

Q. How did you obtain this job?

A. I was still working on the railroad and the talk about all the construction going on in this area and having an interest in property holdings near some of the construction going on, I went to the Walsh yard to—at that time I didn't know what kind of work Walsh was engaged in or any-

(Testimony of Jack L. Wood.)

thing. I had never been out there before. I didn't know any of its employees or anything. I went out there primarily to see if perhaps some of the land we had couldn't be leased by the company for equipment or something like that, and then is when I found out that Walsh was engaged primarily in tunnel construction at Oroville.

Q. And what steps did you take to get this job?

A. By walking through the shop, I noticed the mine locomotives, with which I am very familiar, approximately the same type that I have had quite a bit of experience on, and I [57] ran into Mr. Shulz, and I asked him about whether Walsh had any contracts around close to where that land of ours was, and in the ensuing conversation Mr. Schulz—I indicated that I had a lot of experience in that line of work, so he suggested that I go to Sacramento and get a clearance to go to work and go to work for him then. He needed a man with that kind of experience.

Q. Get a clearance from whom?

A. From Local Union No. 340 in Sacramento.

Q. And did you? A. (No response.)

Q. Did you get such a clearance?

A. I did.

Q. Was Local 340 a railroad local?

A. It is what is known as an inside wireman's local, primarily I believe that is what it is [58] called.

* * *

(Testimony of Jack L. Wood.)

Q. (By Mr. Bowe): Who did you pay the local dues to? A. Local 340.

Q. Who did you pay the regular dues to?

A. Local Union No. 800.

Q. What type of work did you do for Walsh?

A. I worked in the yard at Oroville repairing locomotives [59] and modifying hoist controls, wiring of concrete, tunnel concrete equipment, construction around the yard, in the warehouses, in the office, repairing batteries. [60]

* * *

Q. When did you quit this job with Walsh?

A. I did not quit.

Q. When did you leave this job with Walsh?

A. I was laid off in December of 1958.

Q. What did you do about getting a job after that?

A. I went to the dispatcher in Chico and put my name on an out-of-work list, an ordinary looking ledger that they had. I do not believe that this referral system was in effect at that time. I put my name at the bottom of a list; however, there was two books there. As I understand, one book was for travelers and one was for members.

Q. How did you understand this?

A. Because the business agent there told me so.

Q. What did he say?

A. He said, "That is the travelers' book there; that is the one you are supposed to sign."

Q. Did he explain to you the difference between being on the travelers' book and the other book?

(Testimony of Jack L. Wood.)

A. I can't remember the exact conversation that took place, but I do know one was a travelers' list and one was a members' list.

Q. Well, from your own knowledge—— [61]

A. And——

Q. Go ahead.

A. I understood that the travelers would not be referred until the list on the members' book had been expired.

Q. Did you get a job?

A. A little later that month, yes, I was referred to Wismer & Becker Electric Company, who are subcontracting for Peter Kewitt & Sons.

Q. How long did you work for Wismer & Becker? A. Approximately one year.

Q. Did you pay any dues while you held this job?

A. I paid my dues into Local Union No. 800, and working dues, dobie, to Local Union No. [62] 340.

* * *

Q. Did you take any steps to join Local 340 while you held this Wismer & Becker job?

A. Yes.

Q. What steps did you take?

A. I had my two years' experience that I was formerly told was required and so I obtained an application form from the Chico office and presented a traveling card from Local 800. I paid three months in advance, and on this form I listed

(Testimony of Jack L. Wood.)

my experience, and I presented it to the executive board, I think it was. Anyway, the executive board is the one that handles it, and it got into their hands, anyway. I believe that was in July. Now, it may have been August, or it might have been June.

Q. This was '59? A. '59, yes.

Q. And what resulted?

A. Oh, about three months later I got a letter from Local Union 340 stating that my card would not be accepted at this time, not giving any reason why, only that it would not be accepted at this [63] time.

* * *

Q. When did you leave the Wismer & Becker job?

A. I left December the 19th. I think it was December the 19th, yes.

Q. Why did you leave the job? A. 1959?

Q. Why did you leave the job?

A. Primarily for personal reasons. At home I have a daughter who is ill, can't attend school, and I was so far away from home, and I own my own home in Oroville, I just couldn't see moving to Placerville, things being in the condition they were, so I came home, and I quit primarily for that reason.

Q. What position did you hold on this Wismer & Becker job when you quit?

A. I was a tunnel electrical foreman.

(Testimony of Jack L. Wood.)

Q. Did you have any exchanges with union representatives of 340 about receiving that job?

A. Do you mean conversations, Mr. Bowe?

Q. Yes, sir. A. Yes, I did. [64]

Q. Who was that business representative?

A. Mr. Jack Galvin.

Q. What office did he work out of?

A. Sacramento office of Union No. 340.

Q. Will you tell me the exchange that took place between you and Mr. Galvin?

A. Well, Mr. Galvin came to the job several times and his attitude was always very friendly excepting for one time, I won't bother to explain, but his attitude when he came to the job the first two times that I remember, he was very, he seemed a little disturbed because I particularly had transferred to that job at Union Valley from Tunnels 4 and 5, but he thought it was all right.

Q. You transferred within Wismer & Becker; you were still working for Wismer & Becker, but you transferred from one tunnel job to another tunnel job? A. I did that.

Q. Approximately how many miles apart were these two tunnel jobs?

A. 120, maybe, or thirty.

Q. All right. Tell me the exchange that took place between you and Mr. Galvin that you referred to at this time. [65]

* * *

Q. (By Mr. Bowe): Forgetting his attitude, state only what was said by you and Mr. Galvin.

(Testimony of Jack L. Wood.)

A. On his first visit, Mr. Galvin——

Q. No, just the last visit.

A. The last visit?

Q. Yes.

A. That was some time in November, just prior to Thanksgiving, Mr. Galvin showed up on the job and a little bit of a beef or argument developed.

Q. What was said?

A. Well, I asked Mr. Galvin who had called Wismer & Becker in, the subcontractor for the job, and notified them that there was an incompetent foreman on the job up there, and during this conversation Mr. Galvin and I both became perhaps pretty angry, and he said to me, "Why don't you go back to where you came from?" But to this day I don't know who instigated such a move as to try to—— [66]

* * *

Q. (By Mr. Bowe): After you left the Wismer & Becker job, did you take any steps towards getting another job?

Trial Examiner: Well, we didn't cover that, did we?

Mr. Bowe: It has no relevance.

Trial Examiner: All right, that is good.

Q. (By Mr. Bowe): Did you take any steps toward getting another job, sir? A. I did.

Q. What steps?

A. I went to Chico, California, and registered on the books.

(Testimony of Jack L. Wood.)

Q. On what day?

A. December 23rd, 1959.

Q. Who was in the office when you went in?

A. Mr. Hamilton was in the office.

Q. Did you talk to him through the dispatch window?

A. Not at that time; the electricians were just sitting around in the office.

Q. Where was Mr. Hamilton sitting? [67]

A. At his desk.

Q. All right. Now, think back carefully and relate just the conversation, just the words that were used by you and Mr. Hamilton in this conversation, and relate for us what was said.

Trial Examiner: Mr. Wood, this is pretty simple, and there is one way of getting at it, and that is what you did say to Mr. Hamilton, what did he say to you, and what did anybody else there say, and that is it.

A. I asked Mr. Hamilton to be on the out-of-work list and he complied by handing me an out-of-work book, and I signed, but at that time I said, "I have to be in group 1," and he said I'd have to be in group 3.

Q. (By Mr. Bowe): All right, go on.

A. He said I'd have to pass an examination to be in group 1.

Q. Did he ask you any other questions?

A. Yes, he asked me what union I belonged to.

Q. And what did you respond? A. 800.

(Testimony of Jack L. Wood.)

Q. Was there any other conversation?

A. I said to Mr. Hamilton, "I've come from the Union Valley job; I quit over there, and a man by the name of Leighton that you sent over has taken my place, and I broke him in," and Mr. Hamilton replied he didn't need any breaking in, he was already a tunnel man, and I said, "Yes, perhaps, but not [68] on that job." [69]

* * *

Q. (By Mr. Bowe): Between December 23rd, 1959, and February 5, 1960, did you have any occasion to return to the union hall in Chico?

A. Yes, I did. I went to the union hall on an average probably of two times a week every week.

Q. What would you do when you went to the hall these times?

A. I would stick around a few minutes and ask Mr. Hamilton if there was any work, how things looked, and I asked him—it must have been a couple of weeks, something after I initially registered, I don't remember, but somebody told me you were supposed to give it to him in writing that you had been there, so I asked Mr. Hamilton about this and he said he knew that I had been there, that I could send in a card if I wanted to, but he didn't offer me any book to sign; so I wasn't familiar with the contract. I didn't—at that time I didn't know that there was any place on the slip to sign.

Q. Did you have any conversation with Mr. Hamilton between December 23rd and February 5,

(Testimony of Jack L. Wood.)

1960, in the union hall, other than the one you related?

A. Yes, about the examination, during that period they posted a notice on the wall that there would be an examination.

Q. What was the purpose of this [70] examination?

A. To move applicants for employment from group 4 to 3, to 2, to group 1, whatever the requirements are in the contract to be a journeyman wireman. It was a wireman's examination.

Q. And what was the conversation between you and Mr. Hamilton about this examination?

A. Well, I told him I would take it if that would put me in group 1. I don't know what he replied.

Q. How did you find out about the examination?

A. It was posted on the wall, and then——

Q. Where?

A. At the Chico dispatch office, inside of the office, and then I called Mr. Joe Krivanek; he is the Chairman of the NECA, and he knew where the examination would be.

Q. Did you in fact take this examination?

A. I did.

Q. When?

A. It was on January 16th, I believe.

Q. Did you have a conversation with Mr. Hamilton concerning the examination? A. Yes.

Q. Before or after you took the examination?

A. Before and after, both. I asked him afterwards when they were going to send the result of

(Testimony of Jack L. Wood.)

the examination, and he replied that he didn't know, that it ought to be out by the next meeting; I think he told me that once. [71]

Q. And between December 23rd, 1959, and February 5, 1960, did you have any other conversations on any other subjects with Mr. Hamilton?

A. (No response.)

Q. Other than the examination and other than whether you had to sign the book or not?

A. Yes, I did have.

Q. What was it?

A. In regard to working at my previous employment for Walsh, I said to Mr. Hamilton, "I have worked for Walsh before, on that type of work they have in the yard out there."

Q. Did you have any discussion about what group you should be in?

A. Yes, I did. I went to my home local, or to Local 800, the shop committeeman there in Oroville, and I got a statement from the committeeman there that I had passed an examination insofar as the meaning of that contract went. It would be an experience rating test.

Q. What conversation did you have with Mr. Hamilton about this, if any?

A. Well, he wanted proof that I had passed an examination. He asked me for proof, so I got that, but he didn't accept it.

Q. Approximately during what period of time was this discussion with Mr. Hamilton?

A. It was during January, 1960. [72]

(Testimony of Jack L. Wood.)

* * *

Q. What were the circumstances concerning your changing from one group to the other?

A. Mr. Hamilton went to the dispatch hall one morning and he handed me a——

Q. What morning, when?

A. It was in February, February the 5th, I believe.

Q. All right, what was said?

A. (No response.)

Q. You were in the dispatch hall?

A. Yes.

Q. For what purpose?

A. To see if there was any work, as usual.

Q. All right, what was said?

A. He handed me a group 4 book, and I told him, "How come?"

And he said I wasn't supposed to be in group 3, and actually there wasn't too much conversation between us on this, but he presented only the group 4 book for me to sign.

Q. And did you sign it? A. I did.

Q. Did he ever tell you why you should be in group 4 as [73] opposed to group 3?

A. Yes, it was—the exact words I don't remember, but it was because I hadn't passed an examination yet.

* * *

(Testimony of Jack L. Wood.)

Q. Did you ever have any conversations with Mr. Hamilton concerning the Walsh job?

A. Yes, after I registered on the books in Chico I did.

Q. Approximately when was your first conversation with Mr. Hamilton concerning the Walsh job?

A. Well, I initially registered there; I told Mr. Hamilton I had worked for Walsh.

Q. No, I am referring now to the fact that Walsh apparently made some request for a man in 1960 possessing some special [74] skills.

When did you first hear of this particular job in the shop?

A. It was in—I knew that Walsh would be needing men because, on account of I had worked there before. I knew what there was to do, but I didn't know that Mr. Shulz had asked for any special skilled men until some time in early February, I believe.

Q. Did you have any conversation with Mr. Hamilton concerning the job? A. Yes.

Q. When was the first one?

A. In early February; concerning the prospect of me working on the job was probably in early February.

Q. What did he reply?

A. That there was a lot of group 1 men still ahead of me and so on, but then I heard about the special skills, so I wrote it on my dispatch slip finally.

(Testimony of Jack L. Wood.)

Q. Wrote what on your dispatch slip?

A. Lead burner, welder, DC repairman, and so on.

Q. Now, you have heard some testimony from Mr. Shulz concerning your appearance on the job on March 18, 1960. Will you go back to that morning of March 18, 1960, and tell me—well, first, did you go to the Union Hall that morning?

A. I did. [75]

Q. Did you have any conversations with Mr. Hamilton at the union hall that morning?

A. Yes.

Q. What was the conversation?

A. I went up to the window; he had the door locked, and they didn't go inside any more; they went to the dispatch window. And I said to Mr. Hamilton, "I think there is a job open at Walsh's for a special skilled man. How about me?"

And he replied, "I don't know anything about it."

But then immediately following that I talked to Mr. Wheeler and told him——

Mr. Grodin: Where?

The Witness: Downstairs. We had gone down on the sidewalk.

A. (Continuing): And I told him that I had asked Mr. Hamilton about this job, and so he said, "Well, I will go up and ask him."

So he did go up and ask him and obtained a clearance for the job.

(Testimony of Jack L. Wood.)

Q. (By Mr. Bowe): How do you know he obtained a clearance for the job?

A. Because when he came downstairs I was getting in my pickup over there and he waved it at me.

Q. Was anyone with him?

A. Mr. Hamilton was. [76]

Q. Where did Mr. Wheeler and Mr. Hamilton go then?

A. They started towards Oroville, so I followed them right on out to Walsh's yard that day, right in behind them.

Q. And what conversations took place at the job site?

A. Well, Mr. Wheeler and Mr. Hamilton and I walked into the shop and Mr. Shulz was standing there, and I said to Mr. Shulz, "Didn't you want two men?"

And he said, "No."

And I saw Mr. Wheeler hand his clearance to Mr. Shulz, and I heard Mr. Shulz ask him about his qualifications right there and——

Q. Since that date have you had any conversations with Mr. Hamilton about this job?

A. Yes, I have, very frequently.

Q. How often?

A. Every time I go to Chico to the dispatch window.

Q. Since February 5, 1960, have you been signing the out-of-work book? A. I have.

(Testimony of Jack L. Wood.)

Q. Do you have to sign every visit or just once a week?

A. Just once a week providing it is that—doesn't extend over seven days.

Q. Have you only been going once a week?

A. No.

Q. How often have you been going? [77]

A. Two to three times, never less than two.

Q. In the course of these conversations, what reason has Mr. Shulz given you for not accepting you out on the job?

Trial Examiner: Not Mr. Shulz; you don't mean Shulz, do you?

Mr. Bowe: Thank you, sir.

Q. (By Mr. Bowe): Mr. Hamilton.

A. He's said he didn't know anything about it, Walsh needing a man, most every time I asked him, and——

Q. Has there been any discussion of whether you possess the necessary skills or not?

A. Yes, there has. I started writing it on my dispatch slip, that is, in that book, so he wouldn't overlook it any more.

Q. Did he say anything when you wrote them in? A. No.

Q. Wrote the skills in?

A. No, he did not, because that had been written on the men that had been cleared before, that was written on their dispatch slips when they were cleared.

Q. Has Mr. Hamilton ever had any occasion to

(Testimony of Jack L. Wood.)

talk to you about a job in Sacramento with the railroads? A. Yes, he has.

Q. When? A. Several times. [78]

Q. Between what periods of time?

A. In May he asked me, told me I could go back to the railroad local, they wanted men in Sacramento, but I said that I could not possibly work in Sacramento under the conditions, the wages, and no subsistence or anything, it would be impossible for me to live in Oroville and work in Sacramento at the railroad shop.

Q. After the February 5 incident when you were placed on another list, did you take any steps toward rectifying this?

A. Yes, February the 12th, when it became obvious I wasn't going to get an answer to that examination, January 16, I did make out a referral complaint.

Q. Before you made out the referral complaint, did you complain to anyone either orally or in writing, any union official?

A. Yes, Mr. Hamilton I did.

Q. Did you write to anyone?

A. No, I did not put it in writing, except the referral complaint.

Q. (By Mr. Bowe): Did you write a letter to Mr. Harbak? A. Yes, I did.

Q. Who is Mr. Harbak?

A. He is the International Vice-President of this district.

Q. What union? A. Of the IBEW. [79]

(Testimony of Jack L. Wood.)

Q. And this was dated February 4, 1960?

A. Yes, I did write that letter.

Q. And what was the purpose of that letter?

A. I told Mr. Harbak what happened. Mr. Myers wanted me for a foreman on that tunnel job out there at Gates & Fox's job at Oroville.

Q. Other than your complaint over the Myers' job, did you complain about anything else in this letter to the International President?

A. Yes, Mr. Myers had attempted to have me for a foreman, or get me for a foreman out [80] there.

* * *

Mr. Bowe: At this time I would like to introduce as General Counsel's Exhibit No. 5 a document headed "Referral Complaint" and signed by Jack L. Wood, dated March 16, 1960—excuse me, this was 5?

Trial Examiner: This is 5.

Mr. Bowe: It is my understanding that Mr. Grodin will stipulate to the authenticity of this document, and I offer it in evidence at this time.

Trial Examiner: There being no objection, the document is received and marked General Counsel's Exhibit No. 5.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 5 for identification and received in evidence.) [82]

(Testimony of Jack L. Wood.)

GENERAL COUNSEL'S EXHIBIT No. 5

Referral Procedure Complaint

1. Name of Complainant (please print) Jack L. Wood.

2. Date and time of the questioned dispatch: March 18, 1960, 9:20 a.m. P.S.T.

(Month, day, year, time of day.)

3. On what grounds is the dispatch regarded as improper? (State fully. Your attention is called to the Rules on Appeal, particularly Sections 7 and 9. In the event the space is inadequate, continue on a blank sheet and attach to this sheet.)

Business Manager S. H. Hamilton referred Mr. Jack Wheeler on March 18th, at 9:20 a.m., to Walsh Const. Co. of Oroville, Calif., Mr. Wheeler registered his name on the books at Chico, Calif., Fririday, March 4, 1960.

Mr. Schultz, Electrical Supt., for Walsh Const. Company, tried unsuccessfully for two weeks and six days, prior to March 4, 1960, (the date of Mr. Wheeler's registration), to hire a man possessing special skills, defined as welder, lead burner, D.C. equipment repairman, and battery repairman.

Mr. Schultz notified Mr. Hamilton that I, Jack L. Wood, (Complainant), did possess the skills required and had successfully performed such skills

(Testimony of Jack L. Wood.)

when previously employed by his company. This notification to Mr. Hamilton was made on Feb. 12, 1960. Mr. Hamilton, business manager, would not give me, Jack L. Wood, clearance for this job.

The above incident is a clear-cut violation of Art. IX, Section 4c, Paragraphs 2 & 3, of the referral procedure.

I, Jack L. Wood, am the target of discrimination by the business managers of L.U. 340 I.B.E.W. I wish to be reimbursed by said responsible parties at the rate of $4.28 per hour, 40 hrs. per week, and five days subsistance pay at $3.00 per day, since Feb. 12, 1960, to cessation of this discrimination.

I, Jack L. Wood, have been registered on the books, at Chico, since Dec. 23, 1959.

4. Precisely when did you become aware of the facts set forth in your answer to Question 3?

March 18, 1960, 11:00 a.m.

Dated: March 18, 1960.

/s/ JACK L. WOOD.

Full Signature of Complainant.

Address: 103 Worthy Ave.

City: Oroville, Calif.

JLW:jkp

cc

Received in evidence June 21, 1960.

(Testimony of Jack L. Wood.)

* * *

Cross-Examination

By Mr. Grodin:

Q. Mr. Wood, when you went in to register on the Union's out-of-work list in December of 1959, did you notice at that time that there was a printed set of rules governing the operation of the hiring hall which was posted on the premises?

A. Not at that time.

Q. When did you first notice this set of rules?

A. It was later; how much later I don't recall, but Mr. Hamilton did call my attention to it later.

Q. Where was it when he called your attention to it?

A. Posted over behind the desk. If I describe the room, the desk sets in the corner, and they were posted over behind the desk next to a closet [84] door.

* * *

Q. When you first went in to register, I understood you to say that Mr. Hamilton told you, you couldn't be in Group 1, and you asked him why, and he said it was something because you hadn't taken the examination, is that right?

A. He said you had to have proof of the [85] examination.

* * *

Q. Did you ever see a copy of the collective bargaining agreement?

(Testimony of Jack L. Wood.)

A. Not until, I think it was the meeting in January—I beg your pardon; we had a copy of it there in our trailer at the Union Valley job, our shop trailer, but they didn't hang there 24 hours; we were supposed to have a copy there, but somebody took off with them, and I never did get a chance to read them. That was the only copy I had. It wasn't in a booklet like that or anything; it was just on a mimeographed paper, I believe. [86]

* * *

Q. Now, you say you came in there two or three times a week after that until February 5?

A. I did.

Q. Did you ever see anybody go up and sign the

A. I saw them do something in the referral

referral book?

A. I saw them do something in the referral book, but I did not look over their shoulder to see what they were doing.

Q. Did you see people doing something to the referral book week after week, the same people who had done it before?

A. I never paid any attention to that because I thought that my being there was in order and would qualify me for a job if one would arise, without penalty.

Q. You saw people doing something in the referral book; did it ever occur to you to inquire and ask what they were doing?

A. Yes, it did. About a month from that, less than that, I didn't know whether I was supposed

(Testimony of Jack L. Wood.)

to give him a slip of paper saying I am available for work or what, and that is what I asked [87] about.

* * *

And I asked him who had done that, called Wismer & Becker, and he——

Q. Do you recall what he said?

A. (No response.)

Trial Examiner: If you don't recall, say "No."

The Witness: No, I don't recall what he said.

Q. (By Mr. Grodin): Do you recall anything else that was said during that conversation?

A. Yes, he said it was his job to protect the local members, No. 340, and I said, "You know I belong to the IBEW also," and "Don't you protect me, too?"

And he said, "Yes, I am supposed to."

Q. Anything else that was said?

A. (No response.)

Q. Well, let's go on and perhaps you will recall.

Now, when you went in to register in December of 1959, you say Mr. Hamilton handed you a green book which you signed? A. That is correct.

Q. Did you look to see what group number that book was?

A. At that particular date I didn't, no, but I knew it wasn't group 1.

Q. How did you know it wasn't group 1?

A. Because the color was wrong. That is the only way I had of identifying; I have seen group

(Testimony of Jack L. Wood.)

1 dispatches before, and they had a yellow book with yellow pages in it. [94]

Q. Well, if you saw the dispatch slips, you wouldn't see the color of the book, would you?

A. The pages in the book were green.

Q. The pages in the book that you signed were green? A. Green.

Q. So from that you concluded that it was not a group 1 book? A. I did conclude that, yes.

Q. I see. And then what did you say?

A. I asked Mr. Hamilton why I wasn't in group 1.

Q. Did you ask him what group this was?

A. I don't recall that I did, but I knew it wasn't group 1.

* * *

Q. (By Mr. Grodin): Now, why were you concerned about being in group 1?

A. Because with my background and experience and so on I felt that I should be qualified to be in group 1.

Q. But why did it make any difference to you whether you [95] were in group 1?

A. Because I knew that group 1 men were sent out first.

Q. How did you know that?

A. Well, just from hearing the fellows talk on the job.

* * *

Q. (By Mr. Grodin): Now, I am afraid I did not understand your explanation about the ex-

(Testimony of Jack L. Wood.)

amination, Mr. Wood. Would you go over that again? You saw on the wall a notice that an examination was to be held, is that correct?

A. I did.

Q. And did you then inquire as to whether you could take that examination?

A. I did not inquire. I just went and took it because I felt that I was eligible to take it and there wasn't any objection to me taking it.

Q. Did you pass the examination? [96]

A. I don't know.

Q. Did you make any efforts to find out?

A. I did.

Q. And what happened?

A. I called Mr. Christianson about a week after the examination had been given.

Mr. Bowe: Will you identify Mr. Christianson?

The Witness: Mr. Christianson is a dispatcher at Sacramento at the Local Union 340, and he told me that I'd probably be notified at the next meeting.

Q. (By Mr. Grodin): Were you notified?

A. No.

Q. Did you attend the next meeting?

A. Yes.

* * *

Q. Now, on February 5, you say Mr. Hamilton gave you a group 4 book to sign?

A. A book with white pages in it. [97]

Q. Did you know what a group 4 book——

A. I did at that time, yes.

Q. And did you ask him why you had to sign

(Testimony of Jack L. Wood.)

the group 4 book? A. Yes, I did.

Q. And he told you it was because you hadn't passed your examination yet?

* * *

The Witness: Mr. Hamilton, as near as I can recollect, said that I wasn't qualified to take the examination. I believe it was at that time, yes.

Q. (By Mr. Grodin): And did you at that time look at the referral procedure? A. I did.

Q. To see what was required?

A. Yes, I did.

Q. Was that the first time that you had looked at it? [98]

A. I believe at the meeting in January is when the agreement, those kind of agreements were passed out to the members. I got mine I believe the day before the meeting, or the Monday preceding the meeting.

Q. What date in January was that?

A. The meeting was the last Wednesday after the fourth Monday in January.

Q. Did you read the agreement?

A. I did. [99]

* * *

Q. Did you have any conversation with Ward about it?

A. Yes, I did. I wanted to know why he was cleared before me, and he said that Mr. Hamilton said I hadn't verified.

(Testimony of Jack L. Wood.)

Q. Do you know what Mr. Ward meant when he said that Mr. Hamilton said you hadn't verified?

A. Yes, I did. Then I started verifying right around there, or around February 5th or 6th.

Q. And what do you mean when you say started verifying?

A. I put the date and my initials following the date. [101]

* * *

Q. (By Mr. Grodin): Were you required to do this by the terms of the referral procedure, do you know?

A. I knew it after the agreements were passed out, yes.

Q. When the agreements were passed out in the January meeting you learned that you were required to verify, is that right?

A. I know that it said that in there, yes. That was the last Wednesday in January. I knew that it said that I was supposed to give it in writing. It says on the agreement, right there, and of course at that time I was taking Mr. Hamilton at his word that—well, I don't know exactly the dates; I can't—but during January. [102]

* * *

Q. Yes. On February 12, 1960, you stated that you saw Mr. Ward's dispatch slip and that it contained a reference to certain special skills and abilities and that, you stated earlier that you verified

(Testimony of Jack L. Wood.)

the fact that Mr. Shulz was calling for someone with those skills and abilities on March 18, 1960, when you accompanied Mr. Wheeler to the job. Now, I am [105] asking you between the two dates, February 12, 1960, and March 18, 1960, did you make any attempt to find out whether Mr. Shulz was calling for someone with those particular skills?

A. It was not necessary to make an attempt because it was discussed openly in the dispatch office by Mr. Hamilton and everybody there. [106]

* * *

Q. (By Mr. Grodin): Well now, I am not asking you to remember any specific dates. I am asking you to estimate how long after February 12 it was when you first heard this subject discussed in the hiring hall or had a conversation with Hamilton about it yourself. A. (No response.)

Q. Was it three weeks or less or more?

A. It was maybe a week.

Q. Maybe a week after February 12th?

A. Yes.

Trial Examiner: And he said he discussed it from time to time between those dates, which I take to mean on more than one occasion.

Q. (By Mr. Grodin): After—Beginning with the week after February 12, you discussed it from time to time, is that correct? [107] A. Yes.

Q. But the first discussion you participated in or overheard was approximately one week after February 12th?

(Testimony of Jack L. Wood.)

A. That is, I presume it is right. That seems to me to be about right, yes.

Trial Examiner: That seems to be the best of the witness' recollection.

Q. (By Mr. Grodin): Now, when did you first indicate on your dispatch registration that you possessed these skills and abilities?

A. I do not recall. I think it was in February I first indicated.

Q. Could it be, Mr. Wood, that you didn't indicate that until after you went out to the job with Mr. Wheeler on March 18, 1960?

A. It could have been, but it seems to me like it was in February.

Q. But you are not sure?

A. I am not sure about it, no. [108]

* * *

Q. (By Mr. Grodin): When was the first conversation you had with Mr. Shulz about this job?

A. Are you referring to the job I could have possibly had?

Q. Yes.

A. I don't like to consume this time. Give me time to think a little bit, will you please?

Actually, right after one of those calls to the hall over there, when everybody was present in the office and talking about it, I talked to Mr. Shulz one day at the gate [114] to verify, to see if it really was him that called and wanted a man, because every-

(Testimony of Jack L. Wood.)

body was talking about it, you know, and I wanted to make sure it was really the truth.

Q. When was this?

A. That was before Mr. Wheeler was dispatched.

Q. How long before?

A. I don't know how long.

Q. Was it after Mr. Ward was dispatched or before?

A. It was after Mr. Ward was dispatched.

Q. And where did this conversation take place?

A. At the gate of Walsh Construction Company. It wasn't in the yard. Mr. Shulz was driving into the gate just as I drove up and I asked him at that time and he verified that he needed men, but that was all there was to it. [115]

* * *

Q. (By Mr. Grodin): Did you talk to Mr. Shulz at that time to see whether there was anything further he could do about getting you to work for him there?

A. There was no use of asking Mr. Shulz to do anything else. I didn't ask him to do anything else, no. [118]

* * *

Q. Did he indicate to you that he would like to have you on the job?

A. He has indicated that, yes.

Q. When was the first time he indicated that?

A. While I worked for him the first time.

(Testimony of Jack L. Wood.)

Q. I mean since then.

A. Oh, what I actually know about was, at that particular day was when he—I know that he had indicated that he wanted me on the job, yes, when he told Mr. Hamilton that I was qualified to do the work. [119]

* * *

Q. (By Mr. Grodin): You indicated, Mr. Wood, that you thought the Union was out to get you. Did you ever have any conversation with anybody from the Union as to why that should be so?

A. You mean member of the Union?

Q. Any—— A. ——or official?

Q. Any official of the Union, let's say that.

A. Yes.

Q. Whom did you talk to?

A. Mr. Joe Campbell.

Q. And when did that conversation take place?

A. That took place, it must have been in December, 1958, because it was while I was out of work that time. I called [120] the hall in Sacramento and asked to talk to Joe Campbell, and at that time he asked me over the phone what local I was out of, and I told him 800. He said that was bad. He said that is not so good—I beg your pardon—and I said, "What's so bad about it?"

He said that they don't have wiremen, I believe that this is what he said, "Don't have wiremen in 800."

Q. You said that he told you that it was bad

(Testimony of Jack L. Wood.)

because members of 800 don't have the wiring experience as journeymen, is that correct?

A. It was just, he told me it was just bad because I was a member of 800; I shouldn't work in a construction local.

Q. Mr. Wood, this is a serious matter and I want to bring Mr. Campbell in to clarify any matter on which you may be uncertain.

Now is it not correct that Mr. Campbell told you it might be difficult for you to obtain work under the construction agreement because you had not had the necessary experience under that agreement, under the hiring hall agreement?

A. It was not put in that kind of wording, no. [121]

* * *

Q. (By Mr. Grodin): Now, did you file an appeal with respect to the refusal of Mr. Hamilton to dispatch you to the Walsh Construction job?

A. On March the 18th I did file an appeal.

Q. And were you notified by the appeals board that the matter was under consideration?

A. I was notified by the appeals board that the matter had been acted upon and they had come to a conclusion, and they felt that I didn't—there was no merit to my complaint. [122]

* * *

Trial Examiner: Now, in these conversations

(Testimony of Jack L. Wood.)

did you inquire and ask Mr. Hamilton why you were not dispatched out there?

The Witness: Yes, I have asked him why I wasn't dispatched. Of course, after this verification —after I hadn't verified, I had given up on that point because after I got the contract I knew that I hadn't verified, and so I didn't try to discuss that any more, and Mr. Ward was dispatched out, actually and truthfully, he was dispatched out ahead of me. If I had verified, I would have had a legal complaint right then and there, but I had not verified, and then after that I asked Mr. Hamilton quite frequently whether Walsh wanted any men now or not and that I had worked out there before, and so on. [124]

* * *

Redirect Examination

By Mr. Bowe:

Q. Mr. Wood, I don't want to go into any great detail in this examination but have you ever received results of the examination?

A. No. [126]

* * *

STANLEY HAMILTON

a witness, called by and on behalf of the General Counsel, having been first duly sworn, was examined and testified as follows:

Mr. Bowe: Mr. Hamilton, whom the Answer admits is an agent of Local 340 of the IBEW within the meaning of the Act, is being called under Section 43B of the Act and the alternative Section 2055 of the Code of Civil Procedure. [127]

Direct Examination

By Mr. Bowe:

* * *

Q. (By Mr. Bowe): What is your occupation, sir? A. Business Representative.

Q. Of what union? A. 340 IBEW.

Q. In the course of that occupation, what duties do you perform?

A. Policing the area, dispatching men.

Q. Policing what area?

A. Well, my area comprises the Tehama County line down to approximately Lincoln on 99-E, and then I have the west side, 99-W, which comprises Willows and Orland, Colusa, and also includes Oroville.

Q. Is this the same area that the hiring hall at Chico services?

A. Chico services also our office in Marysville.

Q. How long have you been a business representative for 340?

(Testimony of Stanley Hamilton.)

A. Since the 1st of September of this year—I beg your pardon, last year.

Q. How long have you operated the Chico hiring hall? [128]

A. Since that date.

* * *

Q. Is Local 800 a sister local of 340?

A. When you refer to sister local, I don't know what you mean.

Q. Well, what is the relationship between Local 800 and Local 340?

A. Well, they are all affiliated with the IBEW; that is about the only affiliation we have. [129]

* * *

Q. Explain for the difference between the railroad local and a wireman's local?

A. A railroad local is mainly concerned with the repair and maintenance of locomotives and equipment relating to railroads. However, inside wiremen—now, we have outside and inside wiremen's classifications. It is concerned mainly with industrial, commercial, residential work.

Q. Does experience as a railroad electrician under a railroad local qualify as experience under your contract?

A. Not as inside journeyman, no, sir.

Q. So that the time spent in a railroad local of IBEW would not count as experience time under the collective bargaining agreement?

A. No, sir, because we have a contract with the

(Testimony of Stanley Hamilton.)

N.E.C.A. and they are not interested in the railroad type of work.

Q. Mr. Wood registered on December 23rd, 1959, did he not? A. I believe that is correct.

Q. You placed him in group 3, did you not?

A. Right.

Q. This was incorrect, was it not?

A. Right. [130]

* * *

Q. (By Mr. Bowe): It is true, is it not, Mr. Hamilton, that at this time you were placing all 340 members in group 1 and all other applicants in the group 2 and 3 book? A. That is false.

Q. What was the reason for putting Mr. Wood in the group 3 book?

A. He told me at the time that he was a journeyman wireman.

Q. And all journeymen wiremen are placed in the group 3 book?

A. If they are not placed in either 2 or 1.

Q. Why wasn't he placed in either 2 or 1?

A. Because he didn't have proof that he was from a—had had the experience necessary under our current agreement. If you will read the agreement, you will see they had to work under a contract with the N.E.C.A. for a period of twelve [131] months prior to the time that they registered in order to be in group 1. [132]

* * *

(Testimony of Stanley Hamilton.)

Q. All right. Now thinking back, to your best recollection what information did Mr. Wood give you when he came into that hall that day?

A. He told me he was a journeyman wireman which, perhaps that is the wrong phrase, but that to us means he has passed the journeyman wireman's examination. [136]

* * *

Q. Now, on February 5, 1960, you told Mr. Wood to register on the group 4 book, did you not?

A. Yes, sir.

Q. Why?

A. He hadn't brought proof in that he had these qualifications to be in group 3. [139]

Q. What qualifications had he not brought in?

A. That he was a journeyman wireman.

Q. Now, did you reach this determination to put him in group 4 yourself? A. Yes, sir.

Q. On February 5 you decided that you would change his registration?

A. Well, he had to register because he hadn't verified his first registration; his first registration he hadn't verified. He came in—What was the date? —December 22nd, and he didn't appear again until February, the early part of February; so that slip was dead. He hadn't verified at all that time; so then I required him to make out a new verification slip. [140]

* * *

(Testimony of Stanley Hamilton.)

Q. Do you ever remember discussing the fact that an examination was scheduled for January 16, 1960, with Mr. Wood?

A. I believe we did, yes.

Q. What was the discussion?

A. Oh, as to the date and the meeting, you know, where it was to be held. **[141]**

* * *

Q. Did you dispatch any men to the Walsh Construction job during 1960? A. Yes.

Q. Who was the first man you dispatched?

A. Arnold Olds.

Q. What date? A. The 5th of February.

Q. What year? A. 1960.

Q. When did Mr. Olds register?

A. Same date.

Q. What group was Mr. Olds in? A. One.

Q. Is Mr. Olds a member of Local 340?

A. Right. **[143]**

* * *

Q. (By Mr. Bowe): Sir, did you make a notation after the first conversation that Mr. Shulz wants a man with special skills?

A. Did I make a notation?

Q. Yes. A. No.

Q. Do you recall whether or not he did want a man with special skills? A. Yes.

Q. What were those special skills?

A. Well, DC motor repair, battery repair, lead burning.

(Testimony of Stanley Hamilton.)

Q. Do you remember what response you gave him when he asked for a man with these skills?

A. No, I couldn't tell you what I told him.

Q. Do you know why you didn't refer a man for fifteen days until you referred Arnold Olds?

A. I didn't have a man with those [146] qualifications.

Q. You had Mr. Wood.

A. At that time I didn't know Mr. Wood had those qualifications.

Q. You had Mr. Ward after January 22nd.

A. If I remember correctly, Mr. Ward didn't tell me he had these special skills.

Q. Did you know Mr. Ward was Mr. Shulz's son-in-law?

A. I found it out, but I couldn't tell you when.

Q. Do you know, to your knowledge, that Mr. Shulz—I think I am quoting you here, that Mr. Ward had worked in that shop in Oroville since he was a boy?

A. Well, like I say, I know it now but I learned it after he took the job, but I couldn't tell you when I found out about it. [147]

* * *

Q. So on February 12, 1960, you referred Mr. Ward to the job? A. That is right.

Q. And about two weeks after that, Mr. Shulz called you again and said he needed another man with the same skills, did he not?

A. I don't remember the exact date.

Trial Examiner: Well, did he call you a second

(Testimony of Stanley Hamilton.)

time and say he wanted somebody with the same skills?

The Witness: Yes.

Q. (By Mr. Bowe): This would be the third time now; he called you after Olds was rejected and now he calls you about [148] two weeks afterwards, about two weeks after Ward was sent out; how come it was that you didn't dispatch a man until almost three weeks later when you dispatched Mr. Wheeler on March 18, 1960?

A. Why didn't I send a man out?

Q. Yes, sir.

A. I had no man with qualifications.

Q. You had Jack Wood.

A. Well, Jack Wood at that time, he was signed in group 4.

Q. The group is immaterial to the special skills. You go down the list for special skills and you had no other men, is that correct?

A. I sent another man. By this time he had rejected, if I am not mistaken he had rejected Arnold Olds.

Q. And you sent out Mr. Ward?

A. And I sent out Mr. Ward.

Q. And he called you again in a few weeks?

A. Yes, under the same requisites.

Q. Right, you waited three more weeks to send out Mr. Wheeler; why didn't you send out Mr. Wood during those three weeks?

A. It appeared to me Mr. Shulz was using this special skills to bypass our referral system.

(Testimony of Stanley Hamilton.)

Q. You didn't tell this to the appeals committee when they asked you about the referral system, did you? [149]

A. I wasn't at the meeting when the appeals committee first met. They came and took a statement from me and the decision was favorable to my dispatch system; so there was no necessity of going, dragging out, dragging the thing out. I mean there was sufficient evidence that our dispatch system was in good order, so why was there a necessity of bringing up that.

Q. All right. Now, the appeals committee came to you and took a statement, asked you for your side of this story, right? A. That is right.

Q. And you didn't mention anything about Mr. Shulz trying to circumvent the hiring procedure, did you? A. I believe I did.

Q. You believe you told the appeals committee?

A. Yes, sir.

Q. All right. Now I don't want to trick you again. I have the minutes of that meeting.

A. Well, like I say, I honestly think I did tell them of that.

Q. You told them that the reason you didn't send Wood out was because Shulz was trying to circumvent the contract procedures?

A. That is right.

Q. Did you believe Mr. Wood did possess the skills? [150]

A. The only thing I had to go by were his own statements.

(Testimony of Stanley Hamilton.)

Q. Well, the fact that he held the job for eighteen months——

A. Well, this is similar to—you see, I am not too well acquainted up in that area. I didn't take the job until the 1st of September, and some of this knowledge didn't come to me right at the first. In fact, I had never seen Mr. Wood until he come into the office there when he signed in, so there's a lot of background that I wasn't aware of.

* * *

Q. Mr. Ward was also a group 3 man, wasn't he?

A. Yes. [151]

Q. Mr. Ward was also a member of Local 340, was he not? A. That is right.

Q. When did Mr. Wheeler register on your out-of-work list? A. The 11th of March.

Q. What year? A. '60.

Q. What group was he in? A. One. [152]

* * *

Q. (By Mr. Bowe): Is it true that Mr. Wheeler was a member of a wireman's local from Oregon?

A. That is true.

Q. How long had he been working out of 340?

A. I couldn't tell you definitely, but it was over a year.

Q. Did you know that he was not a member of 340 when you referred him to the job?

A. Yes. [154]

(Testimony of Stanley Hamilton.)

* * *

Q. And after Mr. Wheeler was hired on March 18, 1960, about two weeks later Mr. Shulz called you again and requested another man with the same skills, did he not?

A. (Witness nods head affirmatively.)

Q. You will have to answer yes or no. He can't get a nod. A. Yes, he did.

Q. Yet, you didn't refer a man to that job for another [155] three weeks, until April 22nd, 1960, did you? A. That is right.

Q. And that man was Charles Wing, was he not?

A. That is true.

Q. And when did Mr. Wing register?

A. The 18th of March, 1960.

Mr. Bowe: Off the record.

(Discussion off the record.)

Mr. Bowe: What group was Mr. Wing in?

The Witness: One.

Q. (By Mr. Bowe): Mr. Wing was a member of Local 340, was he not? A. That is [156] right.

* * *

Q. Shulz's job was openly discussed in the office, wasn't it? A. Once or twice.

Q. With various applicants sitting around?

A. (No response.)

Q. Whoever happened to be in the office?

(Testimony of Stanley Hamilton.)

A. That is right.

Q. Why didn't you send Mr. Wood out during this 20-day period?

A. Well, if I remember correctly, like I stated, I thought Mr. Shulz was using this dispatch system as a bypass for our referral system, and, if I recall, he called me again and insisted on having a man in the time there, the difference in the time that I sent one man out and Mr. Wing.

Q. Well, if you were going to send a man out, why not Mr. Wood?

A. Because Mr. Wing was in group 1.

Would it be permissible for me to give a little byline on this, I mean why it was doubtful?

Q. Why what was doubtful, sir?

A. Or why I thought Mr. Shulz was using this referral [157] procedure——

Q. Let me ask you one question first.

Did Mr. Shulz request Mr. Wood by name; yes or no? A. Yes, he did.

Q. How many times?

A. I wouldn't state, possibly two or three.

Q. Did he also request Mr. Ward by name?

A. When he called for a man, I believe it was Mr. Shulz that informed me that Ward had these skills, so——

Q. Well, he mentioned two men by name now; one is a union member and one is not a union member. Why do you send him Ward?

(Testimony of Stanley Hamilton.)

A. I don't get what you mean by one not being a union member. They are both affiliated with the IBEW.

Q. Thank you. One being a local member and one not being a local member?

A. Why didn't I what?

Q. Why did you send Ward and not Wood?

A. When I sent Mr. Ward, I wasn't aware that Mr. Wood had these qualifications.

Q. I am saying, when you became aware that Mr. Wood had these qualifications, why didn't you send Wood out on the job; you sent Ward out on the job.

A. As I stated, I thought Mr. Shulz was trying to bypass our referral system. [158]

Q. Why send him Ward, then?

A. At that time I thought Mr. Shulz was sincere and really needed the man.

Q. When he called for a man and asked for his son-in-law by name, you thought that this was a sincere request? [159]

* * *

Q. (By Mr. Bowe): McAdams was also a member of a wireman's local, of 360, was he not?

A. Of what?

Q. A wireman's local of the IBEW, was he not?

A. He belonged to the local number——

Q. No, I just want to know whether he was a member of a wireman's local of the IBEW.

A. That is true, yes.

(Testimony of Stanley Hamilton.)

Q. And if I asked you what the reason would be that you didn't send anyone out between Mr. Wing and Mr. McAdams, the answer would be the same as you answered before?

A. That is right.

Q. And the answer would be the same as to why you didn't send Mr. Wood out? [160]

Trial Examiner: Being what?

Q. (By Mr. Bowe): Why didn't you send Mr. Wood out between the time Mr. Wing was rejected and the time you sent out Mr. McAdams?

A. In my own mind I still think Mr. Wing can do the work and by Mr. Shulz's letting him go only affirmed my belief that he was sincerely trying to get one man and one man only.

Q. And who was that man?

A. Mr. Wood. [161]

* * *

Q. (By Mr. Bowe): It is true, is it not, Mr. Hamilton, that you have on two or three occasions tried to refer Mr. Wood back to the Local 800 of the railroad, haven't you?

A. I recall once. [164]

Q. What did you tell him at this time?

A. He came in and told me that he needed work real bad, and I told him there was an opening at his home local if he cared to go back there.

I also told him if he cared to come down to Marysville, which I have a different set of books on, if he cared to come down and sign in at Marys-

(Testimony of Stanley Hamilton.)

ville, I thought he could get out there sooner than he could in Chico, and he told me he was coming down there two days hence, but he never made an appearance.

Q. Is Chico closer to his home than Marysville?

A. Oh, there might be about six miles difference.

Q. Chico being six miles closer? A. Yes.

* * *

Q. All these five dispatches were out of order, were they [165] not? They weren't special skill men; they weren't at the top of the list, were they?

A. That is correct.

Q. Actually, with your set of books, you couldn't go back and tell who was as the top of the list anyway, could you? A. Not exactly, no. [166]

* * *

WILLIAM J. CAMPBELL

was called as a witness by and on behalf of the Union, and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Grodin:

Q. What is your position with the Union, Mr. Campbell?

Trial Examiner: What is his full name?

Mr. Grodin: I beg your pardon.

Q. (By Mr. Grodin): State your full name for the record. A. William J. Campbell.

Q. What is your position with the Union?

(Testimony of William J. Campbell.)

A. Business manager of the Union.

Q. Is that the top executive position in the Union? A. Yes. [173]

Q. When was your present referral procedure instituted?

A. Some time in late 1958, I believe, latter part of '58.

Q. As business manager, what are your duties and responsibilities with respect to the referral system?

A. I am the officer responsible for all referrals. The representatives are appointed by myself and they refer members under my general direction, workmen for the trade.

* * *

Q. (By Mr. Grodin): In that connection, have you given any instructions to the business agents with respect to the operation of the referral system?

A. Yes.

Q. What instructions have you given?

A. Well, I have instructed them to follow closely the Article 9 which is our referral plan in referring people to jobs.

Q. Have you given them any instructions as to whether or not they should give preference to persons on the basis of union membership? [174]

* * *

A. Only that I read to them that part of the referral and tell them to abide by it. It says that no part of this shall be dependent on the man's membership.

(Testimony of William J. Campbell.)

Q. Have you given the business representatives any instructions with respect to whether or not they should consult with you in the operation of the referral system?

A. Well, I have talked to all of these men personally. We have gone over this together, and I have told them that if there is anything that comes up that they are in doubt about to get ahold of me and I will decide what to do. [175]

Q. When did you first learn that Mr. Shulz of Walsh Construction Company wanted a man for the shop in Oroville?

A. Oh, I can't be sure about that. It must have been in the first part of the year somewhere, around the first part of the year.

Q. How did you learn about it?

A. Mr. Schulz called me.

Q. What did he say?

A. Well, he said that—he said that Mr. Ward who had worked for them and had previously worked for them was back in the district now and he would like to have him go back to work for him.

Q. And what did you say?

A. I told him that Mr. Ward was in group 4 and that we couldn't, according to our referral system, refer him out until all the other groups had had their chance at this job.

Q. Did he say anything else?

A. Well, in our discussion, it was brought up that he had to have men with special skill or a man with special skill and he mentioned lead burning

(Testimony of William J. Campbell.)

and motor work. That is usually associated with that kind of a contract.

Q. What did you say?

A. Well, I told him then to call up Mr. Hamilton and describe the skill that he needed to Hamilton and Hamilton would try to fill the request. [176]

* * *

Q. What was the next conversation you had respecting Schulz's call for men? [177]

A. Well, the next conversation I had with Mr. Schulz, I believe it was after this discussion about Ward. He called and wanted to put his son to work who has no classification whatever, and, at that time I told Mr. Schulz that we couldn't clear his son for the job at all, that if he had room for a shop boy or somebody to clean up around the place and general labor of that nature that we had no contract that covered that particular phase of the work.

* * *

Q. Now, after this conversation with Hamilton about Ward, did you have any further conversation with Hamilton in which Mr. Wood was mentioned?

A. Yes. Hamilton called me, and I don't know the date, some time after this, after our conversation about the son of Mr. Walsh and said that Mr. Schulz was calling for a man and, again, asked for the identical skills that he had asked for in the first

(Testimony of William J. Campbell.)

place for the first man and that he said that he was—he got the information some way or the impression some way that he was after Mr. Wood.

Q. Hamilton told you that he got the informasome way—— A. Yes.

Q. ——that Schulz was after Mr. Wood? [178]

A. Yes.

Q. What did you say?

A. Well, I told Mr. Hamilton that we had dispatched one man with these special skills and that I didn't believe it was a bona fide request for a mechanic, that there was something more than just a requirement for special skills, that the skills that had been described to me previously could well be covered by this first man that we had sent them, and that centered mainly around lead burning and work on traction motors, I believe.

Q. You did not believe that Schulz required another man to do that kind of work?

A. That specialized skill, no.

Q. Did you give Mr. Hamilton any instructions as to whether or not he should dispatch Wood to the job?

A. I told him he should not dispatch Wood.

Q. Did you have any further conversations with either Mr. Hamilton or Mr. Schulz in which Mr. Wood was discussed?

A. Yes. I went to Chico, that area, because I had been getting reports that Mr. Schulz's son was doing work that was covered by our agreement and we had agreed in our previous conversation that

(Testimony of William J. Campbell.)

the son wouldn't do any of this work, and I kept getting reports that he was doing bench work and work that was strictly of an electrical nature, and I went up to Chico and Mr. Hamilton said, "Let's go over to Walsh Construction and see these specialized jobs and see what this boy is doing over there," and we [179] went over to there.

Q. Do you recall when this was?

A. No. That must have been, oh, perhaps two months after my first conversation with Mr. Walsh —excuse me——

Q. Do you recall whether Mr. Wheeler was on the job at that time?

A. Yes. Mr. Wheeler was on the job at that time.

Q. And you say sometime during this visit to Chico you did discuss Mr. Wood? A. Yes.

Q. Where did this conversation take place?

A. Oh, it took place in Mr. Schulz's office, mainly.

Q. Approximately what time of the day?

A. Well, it was in the morning.

Q. And who was present?

A. Mr. Hamilton, Mr. Schulz and myself. I believe that was all that were present.

Q. What was said concerning Mr. Wood?

A. Well, of course, I maintained that Mr. Schulz was not after that particular skill, that he was after the man.

Q. Well, try to think back and start us in at the beginning of the conversation. At some point along the line, you went up there, you say, to investigate

(Testimony of William J. Campbell.)

the charges that Schulz's son was performing work covered by your agreement but that at some point along the line, you began discussing Schulz's request for [180] men. Now, would you think back as best you can and tell us what was said in that connection?

A. Well, the only thing I can say about that that there was a lot of general discussion about the trade in general and Mr. Schulz had said that he had not asked for Mr. Wood by name, and, although again the impression was there that the pressure was always there to get Mr. Wood on this job.

* * *

Q. Both you and Mr. Schulz talked about Wood?

A. Yes.

Q. What was said about Mr. Wood?

A. Well, I remember that I reiterated that I couldn't send Mr. Wood in violation of our agreement, and I went on to tell him that he had asked for one man out of classification on this special skills business and that we had sent the man out in all [181] honesty and that I knew the man. I knew that he had worked for Mr. Schulz for many years, and I knew that he was capable of doing this work and, at the same time, I said that as far as I can see the job that you have out there—that job doesn't require more than one lead burner. He could do all the lead burning your company has forever. There never would come a time when he would need more

(Testimony of William J. Campbell.)

than one of that particular skill, and I maintained that the rest of the skills were common to all electricians.

Q. Didn't you, at that time, make any statement to Mr. Schulz to the effect that you would try to get him somebody who was capable of performing lead burning work and, in addition, possess the necessary all around skills?

A. I told him that I was sure that we had plenty of group 1 men that had these skills and we would make efforts to send him some of these people.

Q. Did you make such an effort after that conversation?

A. Yes. I believe Mr. Hamilton dispatched—I don't know how many—several men after that including one who I was aware of that had these particular skills, especially lead burning and motor work and had spent his life at it.

Q. Who was that?

A. That was a man by the name of McAdams.

Q. What did you know about McAdams' skills and ability?

A. Well, that he had been an electrician for many years and [182] that most of his training had been in the shop where they handled this hoisting equipment, battery run type of equipment that they use normally in all warehousing and traction jobs of that nature. [183]

* * *

Q. (By Mr. Grodin): Now, Mr. Campbell, to

(Testimony of William J. Campbell.)

get back to the conversation that you overheard between Mr. McAdams and Mr. Christianson.

I hope I didn't misstate it. Would you please state what you overheard?

A. Well, I overheard Mr. McAdams mention Walsh Construction Company and knowing that this—in the back of my mind this thing had been going around, I asked Mr. Christianson to send McAdams in. I wanted to talk to him and I quizzed Mr. McAdams again very thoroughly on what his background had been and his time in the area and so forth. [189]

Q. What did he tell you in that connection?

A. Well, he told me that he had been working in Ohio, previously, and for many years he had been at this trade repairing motors of that nature and batteries and said he had been repairing batteries ever since he was a young lad—I imagine Mr. McAdams is a man of 55—had many years experience at that type of work.

Q. Did you discuss what happened when he went to report for work? A. Yes.

Q. What did he tell you?

A. He told me that Mr. Shulz had asked him a lot of questions and that he got along with those questions comfortably and then he asked him a question about a controller that he didn't understand and he said that Mr. Shulz didn't go into it very thoroughly.

He passed it on and then had quite a lot of further conversation, and he said, finally, Mr. Shulz

(Testimony of William J. Campbell.)

asked him if he had ever worked in a tunnel and he said no and he said then that Mr. Shulz said that he wouldn't do.

Q. Was there any tunnel work involved at the shop? A. No.

Q. Mr. Campbell?

A. No. The shop is set out miles from any tunnel. It is a headquarter shop. [190]

Q. Was there anything mentioned about Mr. Wood in your conversation with Mr. McAdams?

A. Yes. Mr. McAdams said that he kept mentioning somebody. He said he didn't know who he was.

Q. That Mr. Shulz kept mentioning somebody?

A. Yes, and I asked Mr. McAdams if it was "Wood," and he said, "Yes, that was the name."

Q. Did he say in what connection he kept mentioning this name?

A. No, except that he said that it seemed that that was the man he wanted for the job.

Q. From the outset, then, Mr. Hamilton was following your instructions when he refused to send Mr. Wood out to the job, is that correct?

A. Yes.

Q. And he is presently following your instructions in refusing to send Wood to the job?

A. Yes.

Q. Why will you not permit him to send Wood to the job?

A. Because I am convinced in my own mind

(Testimony of William J. Campbell.)

that this is a subterfuge that Walsh Construction Company is trying to evade our agreement.

Q. Now, was it not the case that Walsh Construction Company was attempting to evade the agreement when Mr. Shulz asked that you clear Mr. Ward for the job?

A. I don't know whether he was trying to evade it or not. I [191] know that there was a very close relationship there between the two, but, notwithstanding that, the man had the qualifications without a doubt.

* * *

Q. (By Mr. Grodin): Since you authorized Mr. Hamilton to dispatch Ward to the job, upon Mr. Shulz's suggestion that he, Ward, possessed the necessary skills and abilities, why didn't you do the same thing with Wood? Why didn't you authorize Mr. Hamilton to refer Wood to the job, too?

A. Well, simply for this reason: Walsh Construction, among many others, has been working in that area on tunnel work for many years, and I would estimate that 50 per cent of the electricians in that area at some time or another have worked on this type of work that they are directly connected with, and I could not believe that they had a right to ask for these—this list of specialized skills repeatedly over and over because these skills that he required—and it was mainly lead burning—that we do not have members—we may have—but we couldn't readily get our fingers on them in group

(Testimony of William J. Campbell.)

1. There are many, [192] many electricians who have made their living on these tunnels up there for years and many of them are in group 1, and I just could not believe that that was a bona fide request for a special skill under our referral system.

Q. When Wheeler was sent to the job, were you aware that Wheeler was not a member of Local Union No. 340?

A. No, I was not aware Wheeler was sent to the job, exactly.

Q. Did you make any inquiries of Mr. Hamilton of whether the people he was sending to the job were members of Local 340 or not?

A. No, I don't. I mean, that isn't—that is up to them to decide who is proper to go out in the proper place unless they run into trouble.

Q. Did you have any conversation at all with Mr. Hamilton as to whether the people you were sending out to the work were members of 340 or not? A. No.

Q. Are you now aware that Mr. McAdams is not a member of Local 340?

A. Yes, I am aware now.

Q. When did you first become aware of that?

A. I can't honestly say—oh, yes, it must have been during my conversation with Mr. McAdams because during our conversation I believe I inquired into his background, the local he worked out of and so forth. [193]

* * *

(Testimony of William J. Campbell.)

Cross-Examination

By Mr. Bowe: [194]

* * *

Q. Did you hear about Mr. Wood's trouble with his examination?

A. I never knew he had any trouble. I had heard that Mr. Wood had gone in and taken the examination and he was not eligible. I know of that incident. [195]

* * *

Q. Did Mr. Hamilton ever tell you that Mr. Wood offered to withdraw the charges if you would send him out to the Schulz job? A. Yes.

Q. What did you tell Mr. Hamilton?

A. I said, "We don't buy that sort of thing." I told him, I said, "We cannot buy that sort of a proposition. It is not honest." [202]

* * *

STANLEY HAMILTON

a witness called by and on behalf of the Union, having been previously duly sworn, was examined and testified further as follows:

* * *

Direct Examination

By Mr. Grodin:

Q. Mr. Hamilton, have the referral procedure rules been posted at the Chico hiring hall?

A. Yes, sir.

(Testimony of Stanley Hamilton.)

Q. For how long have they been posted there?

A. There were two copies in the office when I took the job over the first of September of last year. How long prior to that, [207] I couldn't say.

Q. Have they been there ever since?

A. Yes, sir. [208]

* * *

Q. Of the men that you sent out to Mr. Schulz, which of them were not members of Local 340?

A. McAdams was not a member nor was Wheeler.

Q. Did you know at the time that you dispatched them that they were not members?

A. That's right. [210]

* * *

Q. (By Mr. Grodin): Well, let me ask you this, Mr. Hamilton: Is it your practice in dispatching persons to jobs to make any distinction on the basis of whether the person is a member of the construction local or a member of the railroad local?

A. Oh, definitely.

Q. In what respect?

A. Ours is strictly what we call an inside local, inside and linemen local, and, if we refer someone that isn't a member of our branch of the labor market, they are out of classification. [211]

* * *

(Testimony of Stanley Hamilton.)

Cross-Examination

By Mr. Bowe: [218]

* * *

Q. Now, there has been testimony that there was pressure brought to bear on you to send out Wood and you received an impression that Wood was wanted.

Give us your best recollection on what Mr. Schulz said to you about Mr. Wood.

A. You are speaking about the first conversation?

Q. I would like every reference to Mr. Wood. Start with the first.

A. Well, that is a little hard to recall. I don't remember—at one time there was a request to the effect, "How about letting me get that man off your back?" He has called for him by name and at other times when he called he didn't call for him by name, but there has been so much controversy over it that, in time, the name wasn't even necessary to mention. [223]

* * *

RUDOLPH C. SCHULZ

was called as a witness by and on behalf of the Union and, having been previously duly sworn, was examined and testified further as follows: [228]

* * *

(Testimony of Rudolph C. Schulz.)

Direct Examination

By Mr. Grodin:

* * *

Q. Now, did you, in conversations with Mr. Hamilton, mention Mr. Wood? A. I did.

Q. When was the first time you mentioned Mr. Wood?

A. Well, I wouldn't be sure. I couldn't say exactly when it was.

Q. You don't know? A. No.

Q. Was it some time after Mr. Ward came out to the job? A. Possibly.

Q. Now, when you mentioned Mr. Wood to Mr. Hamilton, what did you say?

A. Well, I made a request for a man with certain skills and he said he would find me someone. I said, "Well, you have a man up there that has those special skills who has worked for Walsh Construction Company for a year or longer. Why not send him?"

Q. And were you aware by that time of the provision in the contract which said that you had the right to call for men of special skills?

A. Yes.

Q. You were aware of that by that time?

A. Yes.

Q. By the time you first mentioned Wood to Mr. Hamilton you [234] were aware of that contract?

(Testimony of Rudolph C. Schulz.)

A. Well, I wouldn't say I was aware of it when I first mentioned Wood or not.

Q. How did you become aware of that contract provision?

A. Well, we got copies of the agreement along at that time. I don't know the exact date when I received them, but it was about that time.

Q. About when?

A. Oh, in the early part of January.

Q. In the early part of January you received copies of the agreement?

A. I believe so. I wouldn't be sure.

Q. So, you became familiar with the terms of the referral procedure at that time, did you?

A. Well, not completely, no. [235]

* * *

Q. Now, what has happened to Mr. Ward?

A. (No response.)

Q. Where is he working?

A. Mr. Ward is foreman on a job in Placerville.

Q. When did he start there?

A. Oh, I don't know, about three weeks ago.

Q. And Mr. Wheeler?

A. He is also a foreman on the job down there.

Q. And when did he start there?

A. Oh, three or four weeks ago.

Q. Why aren't they working in the shop any longer?

(Testimony of Rudolph C. Schulz.)

A. Because they are required down there on a job as supervisors.

Q. Do you need anybody on the job?

A. Definitely.

Q. Why didn't you have Mr. Wheeler and Mr. Ward stay there?

A. Because they are needed more necessarily on the job to supervise it rather than to be in the shop, and the job that they are in requires the same skills for the duration of that job. They are going to maintain these locomotives and batteries [238] and I also need one man on each shift, at least one man on each shift for the duration of that job with these special skills.

Q. And where is your son working?

A. He is working in a shop at the present time.

Q. When Mr. Wood worked for you before, did he work as a foreman at all? A. He did.

* * *

Q. (By Mr. Grodin): You say that you need a man in the shop now, is that correct?

A. That's right.

Q. But you transferred Wheeler and Ward out of there? A. Yes.

Q. If you hired a man in the shop now, how long would he [239] stay there?

A. That is a hard thing to say. He might be there 30 days; he might be there three years.

Q. He might be there only one week, is that right? A. Possibly.

(Testimony of Rudolph C. Schulz.)

Q. And if he weren't there, what would he be doing?

A. Well, he might have to go out on a job somewhere or he might be discharged for lack of work, but, the way it is right now, I can see possibly 30 days' work in the shop. [240]

* * *

Q. Now, would you describe the work that Mr. Wheeler is doing now?

A. Well, Mr. Wheeler is foreman and he is in charge of the tunnel operation which requires the installation of various temporary power cables, maintain various lights, installation of temporary lines in the tunnel, such as lighting lines and chuting lines, general maintenance.

Q. For that work, something in addition to the skills on the battery work is required, is it not?

A. At the particular job he is now in, there aren't any batteries.

Q. No batteries?

A. No, not this particular job.

Q. How about Mr. Ward? What is he doing?

A. Mr. Ward is setting up the job.

Q. What does that entail?

A. Well, it entails hooking up transformers and hooking up [241] battery charges and putting batteries into service and setting up the complete job.

Q. Are these jobs that Mr. Wheeler and Mr. Ward are performing, are those jobs ones that are

(Testimony of Stanley Hamilton.)

normally filled by the dispatch system in Sacramento?

A. Well, the jobs that they have—I fill them with men that I have trained to do that type of work and to supervise this operation. [242]

* * *

WILLIAM J. CAMPBELL

was recalled as a witness by and on behalf of the Union and, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Grodin:

Q. Mr. Campbell, are you familiar with the type of work being performed by employees of the Walsh Construction Company at the tunnel job?

A. I am familiar by hearsay is all at this particular job. [244]

Q. When Mr. Schulz said that he calls the union and asks for men with experience on tunnel work, what do you do? Do you have men with that sort of experience in your local? A. Yes.

Q. About how many men do you have in your local with that sort of experience?

A. Oh, I would say in our local up and down the area in the last years, there has probably been 300 men that have worked in the tunnels.

Q. When you send a man out on that sort of tunnel job, do you send a man who had had particular experience on batteries and lead burners?

(Testimony of William J. Campbell.)

A. Not necessarily.

Q. That is not considered normally a part of tunnel work? A. It is in some cases.

Q. But it is not—if a man asks for a tunnel job, do you send a man with special skills, as lead burner and batter man?

A. No, that is a minority of the jobs that tunnels require. Any person who can handle lead—well, that is a small amount of the work.

Q. Are you aware that Mr. Wheeler and Mr. Ward are now—have now left the job and are working at the tunnel?

A. I am aware now, yes.

Q. From the point of view of the union, would there be anything wrong with Mr. Schulz hiring Mr. Wood and putting him in [245] the shop for a week and then transferring him over to the tunnel?

A. Well, there would be, if he had—anyone of these people that he requires in the shop and that go out of turn—in other words, get an advantage in seniority on the job and, if they were called for shop work to do a special kind of shop work and, then, they were transferred to ordinary work, it would be very unfair.

Q. Who would it be unfair to?

A. It would be unfair to the tunnel man who had, perhaps, been waiting there unemployed and in a higher classification groupwise than the man that was sent out.

(Testimony of William J. Campbell.)

Q. Now, does that have anything to do with your refusal to send Wood out to Mr. Schulz?

A. Well, yes. I feel that it does definitely have something to do with it.

Q. What does it have to do with it?

A. Well, I feel that he was sent these special men, and he got them on the request—lifted them out of their place on the normal referral on a request for special high skills in one small phase of the work and now he has transferred them on to work that is a common type of work, not—it requires knowledge and skill but not of too high quality.

Q. Now, we were discussing with Mr. Hamilton the relationship between a construction local and a railroad local. Would you [246] clarify for us whether you make any distinction between members of a construction local and members of a railroad local so far as your referral system is concerned?

A. Only in that it indicates the background of their skills.

Q. And what do you mean by that?

A. Well, construction people have to be skilled in the safety rules that goes into these things. They have to be skilled in the handling of conduit, pipe, wire and as they relate to the jobs and as they relate to the laws of installation, whereas a railroad local, I believe, is outside the laws of the normal state safety laws and so forth and their work consists of managing the right of way. It is similar in some circumstances but, in general, they have a

(Testimony of William J. Campbell.)

different type of construction that is not related in general to that type of laws.

Q. Do you regard experience under a railroad local's contract as experience which qualifies a person for group 1 status under your contract?

A. No, we don't.

Q. Why not?

A. Well, most of our group 1 employees or applicants, rather, have, at some time in their past, put in four years at the trade, at the construction trade, and it is very broad because it is usually contract work and sometimes this contract will take in a maintenance type of work, but, in general, it is construction work. This is against the experience of a railroad [247] employee who may have experience which is valuable in the field of electrical knowledge but it in no way prepares him to go out and be dispatched almost on any job and many—a large proportion of the group 1 people have taken a formal apprenticeship training, have had formal apprenticeship training. [248]

* * *

Trial Examiner: Well, the thing about it, as I see it, you don't undertake to supply foremen? You undertake to supply journeymen, don't you?

The Witness: We don't undertake to tell the contractor, "You make this man a foreman." We undertake to furnish men that have experience as a foreman and who are thoroughly capable of being a foreman, but he might want to make a man a

(Testimony of William J. Campbell.)

foreman [255] who has never been a foreman on a job before and we have no objection to it.

Mr. Grodin: I have nothing further.

Trial Examiner: Well, as I understand your last question, then, you have no objection to the fact that he has these two men in question as foremen over the tunnel now, is that right?

The Witness: I have no objection in principle.

I feel that the whole thing was used as a subterfuge to hand pick these men. That is my feeling on the thing, my honest feeling, and I have an objection to the whole scheme.

Q. (By Mr. Bowe): When did you get this feeling, sir? Right at the beginning?

A. Well, I don't know how far I should go into this, but, yes, I did. I had the feeling when he asked for Mr. Ward. I didn't feel that Mr. Ward was the only man that could have filled that job by any means. I believe there is many other men in a higher classification that could have filled that job.

Q. How do you explain Mr. Wheeler?

A. How do I explain Mr. Wheeler?

Q. Yes.

A. I know nothing about Mr. Wheeler. I know he was sent out and he was satisfactory. [256]

* * *

ROBERT D. JEWELL

was called as a witness by and on behalf of the Union, and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Grodin:

Q. Would you state your name for the record?

A. Robert Jewell.

Q. What is your occupation?

A. Electrical contractor.

Q. Do you hold any position with the National Electrical Contractors Association?

A. I am president of the local chapter in Sacramento.

Q. Did you hold any position with the Appeals Board of the NECA Local 340 referral system?

A. I was chairman of the Appeals Board.

Q. For what period were you chairman?

A. Oh, from the time it was first conceived until a month ago.

Q. And it was first conceived with the advent of the new referral system which Mr. Campbell testified was some time in [258] the latter part of 1958, is that right?

A. I believe it was, yes.

Q. How many other members of the Appeal Board are there?

A. There is one from the employee group and one public member.

Q. How were you chosen?

(Testimony of Robert D. Jewell.)

A. I was appointed by the president of the NECA at that time.

Q. Do you know how the union member was chosen? A. No, sir.

Q. How was the public member chosen?

A. The public member was chosen by the two members of the Appeal Board.

Q. What is the union member's name?

A. Al Romitti.

Q. And the public member's name?

A. Father Kenney.

Q. Did you as a member of the Appeals Board have occasion to sit on an appeal by Mr. Wood from decision or decisions of the union with respect to his referral? A. Yes, sir.

Q. When was your first contact with Mr. Wood's appeal?

A. The date I couldn't say exactly. I believe it was in January some time, the first appeal that was received, January or February.

Q. Would it refresh your memory to show you the letters of the Appeal Board and the minutes kept by the Appeal Board? [259]

A. Yes, sir.

Mr. Grodin: You have a copy, don't you?

Mr. Bowe: Yes.

A. February 24th is the first meeting that was called in regard to Jack Wood.

Q. (By Mr. Grodin): And did he make his complaint to the Appeal Board that you heard at that time? A. Yes.

(Testimony of Robert D. Jewell.)

Q. What was the nature of his complaint?

A. I believe, at that time, that that appeal was in regard to his group classification.

Q. He claimed that he should have been in group 1 rather than group 4? A. Yes, sir.

Q. Did you have a hearing?

A. Yes, sir.

Q. And what did you determine as a board as a result of that hearing?

A. Well, the decision was that he did not fulfill the requirements of Article 9 of the agreement.

Q. Was that the end of that matter or was there a further hearing?

A. We recessed to give him sufficient time to obtain further proof that he at that time claimed he could get.

Q. Further proof of what? [260]

A. Of his—the types of work that he had performed and that type of thing.

Q. Was that in order to satisfy the experience requirements of group 1? A. Yes, sir.

Q. And did you make a determination as a result of that further hearing?

A. Yes, sir. He came in and stated that he wasn't able to obtain any further proof and, at that time, there was no use in going on with the appeal.

Q. Now, did Mr. Wood file any further appeals with you? A. Yes, sir; he did.

Q. When was that?

A. Well, the date I am not exactly sure of. I

(Testimony of Robert D. Jewell.)

believe it was in March. I don't know whether it is in here or not.

Q. May I call your attention to the minutes of the appeals committee meeting of April 5th in which it referred to an appeal of March 18th?

A. March 18th, yes.

Q. What did Mr. Wood complain about in that appeal?

A. He complained of being discriminated against in not being referred to a job.

Q. And did the Appeals Board make an investigation of that complaint?

A. Yes, sir, we did. [261]

Q. What did you do?

A. Father Kenney and Mr. Romitti and myself made a trip to Yuba City to review the referral books in the Yuba City office.

Q. And did you talk with anybody in the course of that investigation?

A. With Mr. Hamilton.

Q. Did you reach any conclusions?

A. Yes, sir; we did. We couldn't find in the referral where he had been discriminated against in being referred for work.

Q. This was in connection with the Walsh Construction Company and Schulz's request from that, is that right? A. Yes.

Q. Upon what facts did you base your conclusion that he had not been discriminated against?

A. On the books that we reviewed at that time, on the referral slip. [262]

(Testimony of Robert D. Jewell.)

* * *

Mr. Bowe: May we have a stipulation that that is an accurate copy? I would like to later use it.

Mr. Grodin: An accurate copy of the minutes?

Mr. Bowe: Yes.

Mr. Grodin: Yes.

Trial Examiner: It is so stipulated that the one he is looking at is an accurate copy of the minutes and that is of what date?

Mr. Bowe: April 5th, 1960.

Trial Examiner: Okay. It is so stipulated.

Mr. Grodin: You understand I am not stipulating to everything contained here because I don't know whether these minutes reflect everything that transpired, but these were the minutes that were kept. [263]

Mr. Bowe: May I offer them in evidence at this time as General Counsel's No. 6?

Trial Examiner: Well, there is quite a sheath of documents that the witness has here. I think we ought to have it pinpointed here.

Mr. Grodin: It is just three pages, these minutes.

Trial Examiner: If there is no objection, the document is received in evidence and marked General Counsel's Exhibit No. 6.

(Whereupon, the document above referred to was marked General Counsel's Exhibit No. 6 for identification and received in evidence.)

(Testimony of Robert D. Jewell.)

GENERAL COUNSEL'S EXHIBIT No. 6

April 5, 1960.

925 Marcia St., Yuba City, Cal.

Appeals Hearing.
Appeal, March 18, 1960.
Appeal of Jack L. Wood.

Jewell: Read appeal of Jack L. Wood, dated March 18, 1960.

Hamilton: I dispatched the son-in-law of Shultz, Ward, in Grp. 4. Shultz kept asking for Wood. I have sent journeymen to all contractors.

Jewell: Have you sent any other man to the job?

Hamilton: Yes, Wheeler, who is in Grp. 1.

Romitti: Did Shultz want to accept any other man with the qualifications?

Hamilton: He did not want any other man but Wood.

Romitti: Has Shultz called for any men since the first time?

Hamilton: No, he has not.

Jewell: You could have obtained proof from Sacramento on Wood's status.

Hamilton: He shall show me proof of his status as in Article IX.

Father Kenney-Romitti: The burden of proof lies with Wood.

Romitti: He should have been put under temporary employee status at the beginning because he had no proof as stated under Article IX.

(Testimony of Robert D. Jewell.)

Jewell: Where was Wood dispatched from first?

Hamilton: I do not know.

Jewell: Why does he have to show proof since he had worked out of No. 340 before?

Hamilton: Because Article IX says he shall show me proof. I did not know Wood before then.

Father Kenney: Article IX states that Wood shall show proof himself. Hamilton, did you have men in Grp. 1?

Hamilton: Yes, but Shultz would not take anyone else.

Romitti: There was no referral procedure during Wood's 30 months' experience. Also Hamilton was not Business Agent at that time. Wood did not show clearance slips prior obtained as under Article IX. It seems Hamilton did not know of proof of experience before.

Romitti: Did you send Shultz a man when asked? Did he not state for a man by name and he would not accept any other man but Wood?

Hamilton: No, because he did not want any other man, period. Shultz said to send Wood so he would be off my back. Not only work which he has to do shall be lead burning, but also conduit work and etc., through construction, which I know he has no experience. I was not aware he had worked out of No. 340 before.

Jewell: I agree with you but he has done some work out of No. 340 and you should have checked.

Hamilton: The burden lies with him to show proof.

(Testimony of Robert D. Jewell.)

Romitti: Article IX states Wood shall show proof of qualifications of such experience and Business Agent's knowledge of same if known shall be taken under consideration.

Jewell: But he has worked out of No. 340 30 months prior to Article IX.

Father Kenney: It seems proof was not given and under Article IX that shall be done.

Hearing adjourned at 2:30 p.m.

A. E. ROMITTI,
Sec.;

R. JEWELL,
Chair.;

FATHER KENNEY,

HAMILTON,
Bus. Agent,
Appeals Committee.

Received in evidence July 6, 1960.

Mr. Grodin: I intend to ask the witness a question or two about what transpired.

Q. (By Mr. Grodin): Have the minutes refreshed your recollection as to whether Mr. Hamilton said anything in the course of that meeting with respect to the union's reason for refusing to dispatch Wood to the job?

A. Well, Hamilton did state that he had men in group 1 that were available for work but Schulz would not take anyone else but Wood.

(Testimony of Robert D. Jewell.)

Q. Did he tell you whether or not the union felt that Schulz was trying to by-pass the referral system?

A. Well, I don't know if he put it in those exact words. He did say that Schulz called and asked for Wood by name and, at [264] that time, he could not refer Wood because he had other men in group 1 that were available for work.

Q. Now, on the basis of your investigation, you concluded that there had been no discrimination, is that correct? A. Yes.

Q. Was that an unanimous opinion of the Appeals Board? A. Yes.

Q. Did you notify Mr. Wood of that conclusion? A. Yes, sir.

Q. Did Mr. Wood make any attempt to have any further hearing or present any further evidence in the matter? A. No, sir; he did not.

Mr. Grodin: I have no other questions.

Mr. Bowe: At this time, I would like to mark the letter to Mr. Wood giving him the results of this decision as General Counsel's No. 7.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 7 for identification.) [265]

* * *

Trial Examiner: The document is marked as General Counsel's Exhibit No. 7 and received in evidence.

(Testimony of Robert D. Jewell.)

(The document heretofore marked General Counsel's Exhibit No. 7 for identification was received in evidence.)

GENERAL COUNSEL'S EXHIBIT No. 7

April 7, 1960.

5300 Elvas Ave., Sacramento, Calif.

In re Complaint of:

Jack L. Wood,
103 Worthy Ave.,
Oroville, Calif.

On receipt of your complaint dated March 18, 1960, the Appeals Committee proceeded to examine your case with all possible expediency.

The Appeals Committee, on April 5, 1960, conducted a meeting in Yuba City, at which time all dispatch books of Chico were thoroughly examined and B. A. Hamilton was questioned about same.

The Appeals Committee after much deliberation feels the complainant has been referred from Group 4 without discrimination. The Appeals Committee also concludes to deny your appeal.

Yours very truly,

/s/ ALBERT E. ROMITTI,
Appeals Committee.

Received in evidence July 6, 1960.

(Testimony of Robert D. Jewell.)

Cross-Examination

By Mr. Bowe: [266]

* * *

Trial Examiner: General Counsel's Exhibit No. 8 is received in evidence, being this letter of the referral procedure complaint of Jack L. Wood, dated March 18th, 1960.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 8 for identification and received in [270] evidence.)

GENERAL COUNSEL'S EXHIBIT No. 8

Referral Procedure Complaint

1. Name of Complainant (please print): Jack L. Wood.

2. Date and time of the questioned dispatch: March 18, 1960, 9:20 a.m. P.S.T.

(Month, day, year, time of day.)

3. On what grounds is the dispatch regarded as improper? (State fully. Your attention is called to the Rules on Appeal, particularly Sections 7 and 9. In the event the space is inadequate, continue on a blank sheet and attach to this sheet.)

Business Manager S. H. Hamilton referred Mr. Jack Wheeler on March 18th at 9:20 a.m. to Walsh

(Testimony of Robert D. Jewell.)
Const. Co. of Oroville, Cal. Mr. Wheeler registered his name on the books at Chico, Calif., Friday, March 4, 1960.

Mr. Schultz, Electrical Supt., for Walsh Const. Company, tried unsuccessfully for two weeks and six days, prior to March 4, 1960 (the date of Mr. Wheeler's registration), to hire a man possessing special skills, defined as welder, lead burner, D.C. equipment repairman, and battery repairman.

Mr. Schultz notified Mr. Hamilton that I, Jack L. Wood (complainant), did possess the skills required and had successfully performed such skills when previously employed by his company. This notification to Mr. Hamilton was made on Feb. 12, 1960. Mr. Hamilton, business manager, would not give me, Jack L. Wood, clearance for this job.

The above incident is a clear-cut violation of Art. IX, Section 4c, paragraphs 2 and 3, of the referral procedure.

I, Jack L. Wood, am the target of discrimination by the business managers of L.U. 340 I.B.E.W. I wish to be reimbursed by said responsible parties at the rate of $4.28 per hour, 40 hrs. per week, and five days' subsistance pay at $3.00 per day, since Feb. 12, 1960, to cessation of this discrimination.

I, Jack L. Wood, have been registered on the books, at Chico, since Dec. 23, 1959.

4. Precisely when did you become aware of the facts set forth in your answer to Question 3?

(Testimony of Robert D. Jewell.)

March 18, 1960, 11:00 a.m.

/s/ JACK L. WOOD
Full Signature of Complainant.

Date: March 18, 1960.

Address: 103 Worthy Ave.
City: Oroville, Calif.

Received in evidence July 6, 1960.

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* * *

Redirect Examination

By Mr. Grodin:

Q. Mr. Jewell, who kept the minutes of the board proceeding? A. Mr. Romitti.

Q. The minutes reflect that the complaint of Mr. Wood was read at that time. Do you recall it being read? A. Yes, sir. I believe it was. [273]

* * *

Q. In other words, did Mr. Romitti know whether Mr. Schulz would accept any other man that possessed these skills that Mr. Wood set forth in this complaint? A. That's right.

Q. And Mr. Hamilton replied, "He did not want any other man but Wood."

Now, there is an ambiguous or at least ambiguous to me portion of the minutes on the second page and I intend to ask Mr. Romitti whether he has any recollection, but would you see whether this sparks any recollection in your mind?

(Testimony of Robert D. Jewell.)

Mr. Hamilton is stating that Mr. Schulz did not want any other man. "Schulz said to send Wood so he would be off my back," and then he goes on to say, "not only work which he has to do shall be lead burning, but also conduit work and et cetera through construction, which I know he has no experience." That is not a very meaningful sentence. I wonder whether that recalls to your mind what was said on that subject?

A. No, I couldn't recall by reading this although it seems Schulz is asking for a man with special skills at the same time he is going to have him do construction work. In other words, [274] I would assume he didn't have enough work for a lead burner or a battery repair man of special skills to keep him going all the time. He intended to use him at the same time for construction work.

Q. And that was the union's objection to sending Wood out to the job? Is that your understanding?

A. Well, that would be my understanding, as he had group 1 men or group 2 men which should come before group 4 men which could do that type of work. [275]

* * *

Further Redirect Examination

By Mr. Grodin:

* * *

Q. At that second hearing, did any member of the Appeals Board tell Mr. Wood anything about the procedure to be followed in an appeal?

(Testimony of Robert D. Jewell.)

A. Yes, sir.

Q. What was he told and who told him?

Trial Examiner: Pardon me. Are we talking about the second hearing?

Mr. Grodin: I am talking about the second hearing.

Mr. Bowe: There were two hearings on the first complaint about group placement. The second hearing was on the group placement issue. [276]

The Witness: We had our first meeting and, as I say—we reviewed his first hearing, rather, I should say, and we notified him of our findings.

At the same time we notified him of the findings, we told him that if he wished to appear personally before the board to do so at his own discretion. He did do that. As I say, we recessed to give him further time to submit his proof, and he came in and said that he had no further proof.

At the second meeting, we held—investigation, we went to Yuba City, and he did not request to meet us, personally, to have a personal appearance before the board.

Q. (By Mr. Grodin): Although he had made that request the first time?

A. He had made that the first time, but he did not—after we sent him the findings of our board, he did not request to see us again which was probably two weeks after the first time he had been in.

Q. With respect to the first complaint that he filed on his group classification, he did make a request to appear personally before the board?

(Testimony of Robert D. Jewell.)

A. Yes, he did.

Q. But he made no request with respect to the second complaint? A. No, sir. [277]

* * *

Mr. Bowe: May I offer into evidence at this time a letter as General Counsel's No. 9 in which he was offered the opportunity to appear in person on his first complaint of which [279] letter is dated February 22nd, 1960, and addressed to Mr. Wood.

Trial Examiner: Is there any objection to the receipt of the letter into evidence?

Mr. Grodin: I have no objection.

Trial Examiner: The document is received into exidence.

Next witness.

(Thereupon, the document above referred to was marked General Counsel's Exhibit No. 9 for identification and received in evidence.)

* * *

WILLIAM J. CAMPBELL

was recalled as a witness by and on behalf of the Union and, having been previously duly sworn, was examined and testified further as follows:

Trial Examiner: You are under oath for the third time that you are recalled, Mr. Campbell.

Direct Examination

By Mr. Grodin:

Q. Mr. Campbell, have there been any Local 800 men who have worked pursuant to referral for Local 340? A. Yes.

(Testimony of William J. Campbell.)

Q. Could you name some of them for us? [280]

A. We have a man by the name of Hansen, and, of course, Mr. Wood, I believe, has worked since the referral system went into effect.

Q. He worked before pursuant to referral from Local 340? A. Yes.

Q. And anyone else that you can think of offhand? A. That now belong to 800?

Q. No, that were members of Local 800 at the time they were referred from the local hiring hall?

A. Yes. We have, I imagine, 8 or 10 people in Local 340 now who originated from 800.

Q. And who were referred from the hiring hall while they were members of Local 800?

A. Yes. They were referred but that goes back—some of those referrals predates the Article 9 of our contract.

Q. I see. Now, in the conversation with me during the recess, you told me something of which I was not previously aware, and I will now ask you about it. Was there anything in your prior history with Mr. Schulz which made you suspicious about the bona fide nature of his requests for Mr. Wood?

A. Well, yes, there is. Although Mr. Schulz definitely knows his job, he definitely puts pressure on us to get the men he wants specifically. It would be hard to—I would have to search the records back, but I remember several years back when I was an assistant representative that things of [281]

(Testimony of William J. Campbell.)

this nature come up that there was a little controversy on.

Q. Did Mr. Schulz's treatment of his son have any bearing upon your decision in this matter?

A. Well, that had a good deal—that has to be a bearing on it. He put his son to work under certain agreed-on conditions and he didn't live up to those conditions at all even after, perhaps, a second warning or third warning.

* * *

Do I understand your attitude to be here, Mr. Campbell, that you have no particular animosity toward Mr. Wood, but you are suspicious of Mr. Schulz?

The Witness: Yes, I am. I don't think—although we have an agreement with this company, it is the type of a company that we seldom have agreements with.

* * *

Q. (By Mr. Grodin): And does Mr. Wood's non-membership in [282] Local 340 have anything whatsoever to do with your decision not to refer him to Mr. Schulz?

A. No. It certainly does not.

* * *

Received July 20, 1960. [283]

United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 340, AFL-CIO,

Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.116, Rules and Regulations of the National Labor Relations Board—Series 8, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of proceeding had before said Board and known upon its records as Case No. 20-CB-760. Such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

1. Stenographic transcript of testimony taken before Trial Examiner David F. Doyle on June

21, and July 6, 1960, together with all exhibits introduced in evidence.

2. Copy of Trial Examiner's Intermediate Report and Recommended Order dated October 25, 1960.

3. Respondent's exceptions to the Intermediate Report received November 28, 1960.

4. Copy of Decision and Order issued by the National Labor Relations Board on April 26, 1961.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this .... day of .....

[Seal] /s/ OGDEN W. FIELDS,
Executive Secretary, National
Labor Relations Board.

United States Court of Appeals
for the Ninth Circuit

No. 17425

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 340, AFL-CIO,

Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, et seq., as amended by 73 Stat. 519), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondent, its officers, and agents. Case No. 20-CB-760.

In support of this petition the Board respectfully shows:

(1) Respondent is a labor organization engaged in promoting and protecting the interests of its members in the State of California, within this

judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10(e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on April 26, 1961, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers and agents. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid bearing Government frank, by registered mail, to Counsel for Respondent.

(3) Pursuant to Section 10(e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony, and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board,

and requiring Respondent, its officers and agents, to comply therewith.

Dated at Washington, D. C., this 22nd day of June, 1961.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, National Labor Relations Board.

[Endorsed]; Filed June 23, 1961.

[Title of Court of Appeals and Cause.]

RESPONDENT'S ANSWER TO THE PETITION FOR ENFORCEMENT

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

International Brotherhood of Electrical Workers, Local Union 340, AFL-CIO, respondent in the above-entitled case, answers the petition for enforcement of the National Labor Relations Board as follows:

1. The allegations contained in paragraphs 1 and 2 of the petition are admitted.

2. Respondent has no knowledge respecting the transmission and certification of the record before the Board in this case, as alleged in paragraph 3 of the petition.

3. The Board's decision in this case is not supported by substantial evidence considered on the

record as a whole, and is contrary to law. The Board's order is not supported by the record or by the decision, and is contrary to law.

Wherefore, respondent respectfully requests that the Court, upon consideration of the record, the briefs, oral argument, and all other proceedings herein, enter its decree denying enforcement of the Board's order, and dismissing the petition for enforcement in its entirety.

Dated: June 29, 1961.

NEYHART & GRODIN,

By /s/ JOSEPH R. GRODIN.

[Endorsed]: Filed June 30, 1961.

[Endorsed]: No. 17425. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. International Brotherhood of Electrical Workers, Local Union 340, AFL-CIO, Respondent. Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed: August 1, 1961.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 17426

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

DANIEL ROY PEREZ,

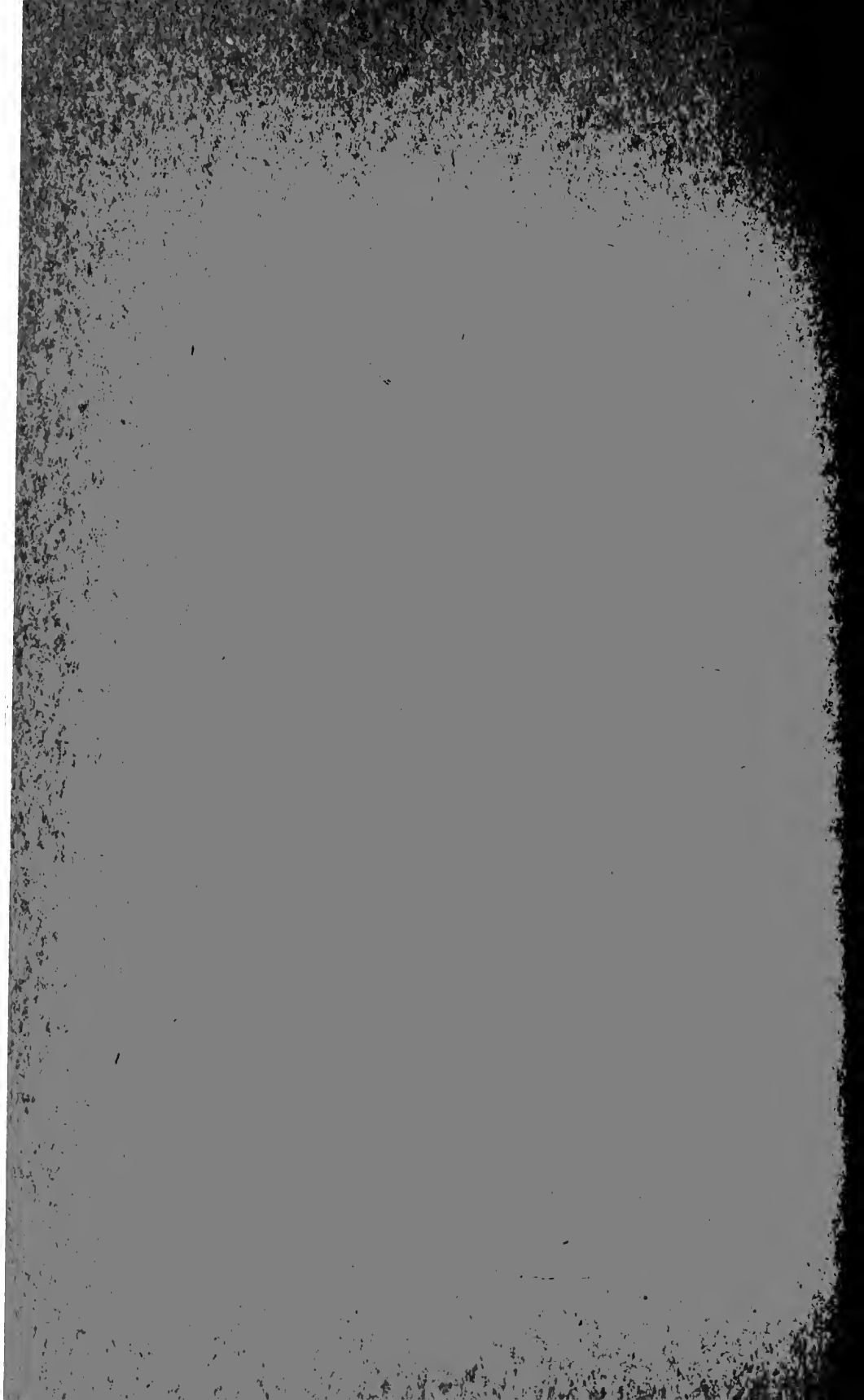
Defendant and Appellant.

APPELLANT'S OPENING BRIEF

Appeal From
The United States District Court For the
Southern District of California
Central Division

BRIAN J. KENNEDY
3440 Wilshire Boulevard
Los Angeles 5, California
DUnkirk 7-3138

Attorney for Appellant
Daniel Roy Perez.



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Attorney for Appellant
Daniel Roy Perez.

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No. 17426

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

DANIEL ROY PEREZ,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

This appeal is made by Daniel Roy Perez from a judgment rendered against him under the date of March 27, 1961 by the Honorable Ernest A. Tolin, Judge Presiding in the United States District Court, Southern District of California, Central Division, in proceedings under the Juvenile Delinquency Act, 18 USC 5032, and from the denial of his motion for new trial. The trial court found that on or about August 21, 1959, the Defendant did commit the offense of juvenile delinquency, in that he, with

intent to defraud the United States, uttered and published as true a United States Treasury Check, in the amount of $72.00, bearing the purported endorsement of the payees, Porfirio and Marceline Andrade, which endorsement was forged, as the Defendant then and there well knew, in violation of Title 18, United States Code, Section 495 (R.T. p. 64, line 16). The court ordered that the defendant be placed on probation until he should reach the age of twenty-one years. Motion for new trial was made by the Defendant and a hearing was held on April 10, 1961 in the courtroom of the Honorable Ernest A. Tolin. The motion was denied. This appeal has been seasonably taken from that denial and the judgment referred to therein.

I

FACTUAL BACKGROUND OF THE CASE

The government contended that on August 21, 1959, the Defendant, Mr. Daniel Perez, appeared at the Belvedere Park Grocery store and presented the United States Treasury check to the owner of the store, Mr. Primo Lira, for payment. It was contended that a conversation followed in which the Defendant advised Mr. Lira that the payee of the check was his uncle; that it was endorsed by his uncle, and that the check had been given to the defendant in order to cash for him (R.T. p. 24, line 5). The check was subsequently negotiated at the Belvedere Park Grocery to the owner, Mr. Primo Lira (R.T. p. 15, line 7).

the day the check was cashed, and that Mr. Perez had been in the store on that day (R. T. p. 43, line 17). Mr. Kenneth B. Thompson, a special agent with the United States Secret Service, who was conducting the investigation of the case, testified that, on the occasion of his first interview with young Perez, he asked the defendant if he had ever been in the Belvedere Park Grocery and defendant denied that he had (R. T. p. 9, line 5). Mr. Thompson testified that later, when he was taking the defendant to the market, the defendant stated that he had been to the market many times (R. T. p. 11, line 6). It is noted that defendant explained that apparent discrepancy by testifying that Mr. Thompson had confused him by misstating the address of the market in question (R. T. p. 57, line 7), an explanation which was tacitly acknowledged by witness Thompson, where he stated, as a part of his recount of taking the defendant to the market, that, " . . . I was a little mixed up as to streets".

On this latter point, the defendant testified that on the first occasion, Mr. Thompson had identified the market as the Belvedere Park Grocery on Brooklyn and Brannick (R. T. p. 57, line 7), and that he knew the market as Primo Lira's market on Fisher Street (R. T. p. 57, line 18). He further testified that when Mr. Thompson later said that Mr. Lira was the proprietor of the Belvedere Park Grocery (R. T. p. 57, line 18), he recognized the market and made it known to Mr. Thompson that he had been in the market on a number of occasions (R. T. p. 11, line 12).

Neither the testimony of the witness Thompson, nor the testimony of the witness Chavez was held by the Honorable trial court Judge to be a substantial factor in its decision (R. T. p. 63, line 18; p. 64, line 9). The court indicated that the case presented by the plaintiff had only two vital points. (1) The "positive identification by the witness Lira of this defendant having uttered the check" (R. T. p. 63, line 19); and, (2) the "rather striking evidence of a form of flight by the defendant" (R. T. p. 64, line 11). The form of flight referred to by the court is related in the testimony of Mr. Lira that the defendant never returned to the store after the time that he was said to have uttered the check, despite the fact that he was said to have made two or three visits a week to the store prior to this time (R. T. p. 17, line 13).

At the trial proper, the bare testimony of Mr. Lira on the first point is disputed only by the uncollaborated testimony of the defendant. The uncollaborated testimony of Mr. Lira on the second point was not disputed as such in the record. The ultimate issue of the trial then, was held to rest on the credibility of the witness Mr. Primo Lira versus that of the defendant, Mr. Daniel Perez. The court resolved this issue in favor of Mr. Primo Lira, noting in the record the evidence of what the court called "flight" as being of significance in arriving at that decision.

II

EVIDENCE WAS SUBMITTED IN CONNECTION WITH THE MOTION FOR NEW TRIAL WHICH REMOVED THE ELEMENT OF "FLIGHT" FROM THE CASE, AND SHOWED THAT WITNESS LIRA WAS UNRELIABLE.

As the court will note, present counsel did not participate in the trial of this case, but was retained on behalf of the defendant for all matters after indicated decision, including particularly the making and presentation of a motion for new trial.

That in connection with said motion, affidavits were submitted to the court from the defendant, and from two witnesses whose information struck at the vitals of the government's case against defendant as follows:

1. Mr. Perez pointed out that both he and his family had understood that the charge related to some alleged August, 1960 event (Aff. D. Perez, p. 3, line 23). For reasons entirely collateral to the charges here, he had terminated trading in Lira's store around August of 1960 (Aff. D. Perez, p. 3, line 16). In truth and in fact, however, he had traded with Lira in apparent friendliness from and after August of 1959, when the unlawful act is supposed to have been done, and for about one year thereafter (Aff. D. Perez, p. 2, line 19). On the one occasion when Lira said anything at

all which could have referred to the check matter, it was about eleven months later and Lira acknowledged that he had been mistaken (Aff. D. Perez, p. 2, line 28, et seq.)

2. That such facts are substantiated by two other young men, Mr. Frank Gomez and Mr. Louie Ocana, who were with Mr. Perez on numerous such shopping expeditions, which not only took place in friendly commercial transactions after the alleged incident, but which included an offer of hospitality from Lira over the Christmas season which to a man of Lira's apparent outlook, was the ultimate in friendliness and good will (Aff. L. Ocana, p. 3, lines 1-26, incl.).

The three affidavits offered in behalf of the defendant on the occasion of his motion for a new trial disclose, in counsel's view, the following:

1. That Mr. Perez shows that his failure to deny the evidence purporting to show that he avoided Lira's market after the August, 1959 incident was due to his own confusion as to the date of the charged event. The implication drawn therefrom by the Honorable trial court Judge, and which materially contributed to the decision thereof, is unwarranted by the true facts, even though it might have found some support in the apparent facts of trial. That in point of fact, Mr. Perez did trade with Lira on numerous occasions after the date of the incident alleged, and in apparent cordiality and in the presence of his associates, even having been offered the run of Lira's bedrooms and

alcohol five months later.

2. That this evidence not only destroys the so-called "flight" evidence, but destroys the credibility of Lira on all other points, including majorly his direct uncorroborated testimony that Perez cashed the check in question, notwithstanding the fact that Perez admittedly did not write the so-called forged endorsement, nor did he or anyone else make an endorsement of any type when Lira supposedly cashed it for him.

3. That defendant has reasonably explained why this evidence was unavailable at time of trial -- he in his mind thought of the charge as an August, 1960 charge, that therefore neither he nor his counsel were alerted to the existence of this valuable evidence. People have walked over oil fields for hundreds of years without anyone appreciating the significance of the lands. So it is with this evidence; no one realized that the apparently mundane facts in the affidavits were significant, the evidentiary content thereof was newly discovered.

III

THE TRIAL COURT COMMITTED SERIOUS ERROR IN NOT GRANTING THE MOTION FOR NEW TRIAL - THE OFFERED EVIDENCE, IF BELIEVED BY THE TRIER OF FACT, WOULD EXONERATE PEREZ, BY DESTROYING THE CIRCUMSTANTIAL EVIDENCE AGAINST HIM AND IMPEACHING THE SOLE MATERIAL WITNESS' DIRECT EVIDENCE.

The evidence offered by the defendant on the occasion of the motion is material, and goes far beyond impeachment or mere cumulative proof. It destroys the credibility of the sole material witness, Lira, against the defendant by showing that the truth was not in him when he said the defendant stopped coming into his store after August of 1959. We candidly admit that we would anticipate that the trier of fact would note and weigh this falsity when he considered other aspects of Lira's testimony, but such evidence goes far beyond that aspect. The court found flight; this evidence disproves flight.

The court judged a "consciousness of guilt"; do not the true facts reveal a "consciousness of innocence"? With the issues of the sole adverse direct evidence shown to be false on a material statement, and the circumstantial evidence removed from the case, does it not appear likely

that Daniel Roy Perez would be exonerated? The trial court, naturally, would have to hear and consider such evidence -- and accept or perhaps reject it. But this can only be done in a new trial. Rejection of the motion therefor has foreclosed the opportunity for Daniel Roy Perez to achieve vindication. Defendant did not and could not have testified as to having been in Lira's store after August of 1960, because in fact he had not been there after that time. There had been an unpleasant scene and he had wrecked his car. If the event had occurred in August, 1960, defendant would have had to bear up against the effect -- whatever it be, of this factor. Here, it is an unjust burden.

Non-production of this evidence at trial was based on the mistake of Perez, who is a minor. A mistake made by an adult defendant may be the basis for granting him a new trial. In Megia v. United States (16873, June 14, 1961, California), defendant was convicted of receiving, concealing, and transporting marijuana. After the end of his trial, defendant made a motion for a new trial and offered to produce a witness who was not produced at the trial because of a mistake in names and lack of information, who would provide defendant with a definite alibi. In reversing, this Court stated that there was nothing to show that the new witness was not a credible witness, and that, if he were produced, the entire case against the defendant might be different. Speaking from the standpoint of gamesmanship, both Meglia and Perez played poorly, but the question of legal guilt or innocence is not a sporting event, the innocent are entitled to their justifica-

tion even when they are slow of wit and clumsy of tongue.

The trial court was reminded by the government that Daniel Perez was a juvenile, being tried for juvenile delinquency, and the court was urged that a lower quantum of proof against him than the standard involved in criminal law generally is therefore a sufficient basis for proof. This point of view represents a curious and, we submit, an insidious perversion of an enactment designed for the benefit and protection of accused youths. The government suggested to the trial court that the Act, in essence, was designed to assist the prosecutor in sliding by on a weak case if the defendant is young enough.

A more rational analysis of the Act is found in Application of Johnson, 178 Fed. Supp. 155, where the Court stated at page 162:

> "Liberalization of criminal law, to permit proceedings to determine acts of juvenile delinquency rather than acts of crime, was not designed to diminish constitutional rights to fundamental fairness and justice."

At page 160, the court developed the thesis even further, when, quoting from In Re Poff, 135 Fed. Supp. 224, it stated:

> "Statutes concerning juveniles are devised to afford the juvenile protection 'in addition to those he already possesses under Federal

Constitution. . . . The legislative intent was to enlarge, not to diminish those protections.' "

As observed in United States v. Borders, 154 Fed. Supp. 214, 216, the very Act, itself, reflects the recognition of Congress that special consideration and protection is necessary to preserve the rights of the young. The court stated the propositions as follows:

"The Juvenile Delinquent Act was enacted with the realization that a youthful offender does not possess maturity of judgment and capacity to fully comprehend the nature or consequences of his offense."

If the philosophy of Congress in the Juvenile Act has validity, it would suggest that a greater degree of understanding should be given to the youthful accused person, not a lesser amount. Evidence which would, if accepted, probably exonerate Daniel Perez was not presented because he thought he was being tried for an event which allegedly occurred in August, 1960. If the event had in fact occurred as of such date, the evidence offered would have been meaningless. But because the charge goes in fact to August, 1959, true justice can only be done by a court that has heard it and assigned a weight or value to it.

A closely related point from the Federal Practice and Procedure text is stated as follows:

"A new trial, however, should be

granted where the newly discovered evidence, although impeaching, is so conclusive as to destroy the credibility of a material witness against the defendant. Thus a new trial should be granted if the court is satisfied that the testimony given by a material witness is false, that without it the judge or jury might have reached a different conclusion and that the party seeking a new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial."

4 Federal Practice and Procedure, Rules Edition 288. Citing:

United States v. Johnson, 149 Fed. 2d 31 (1945).

IV

THE COURT HAS ERRONEOUSLY FAILED TO GRANT THE MOTION FOR NEW TRIAL IN THE INTEREST OF JUSTICE, AS IT DOES NOT SERVE THE PURPOSE OF JUSTICE, OR OF THE ACT UNDER WHICH HE WAS TRIED, FOR THE JUVENILE DEFENDANT TO BE FOUND GUILTY BECAUSE HE FAILED TO COMPREHEND THE DATE ON WHICH IT WAS SAID THAT HE COMMITTED HIS CRIME.

The defendant is a youth of Mexican ancestry, not highly educated, of good moral fiber, and not familiar with the processes of law. He is on probation; if he were in fact guilty he could not have asked for more lenient treatment than he received. He realizes this fact when he asks for a new trial. He understands that if he gets a new trial and his new evidence does not result in his exoneration, he risks more substantial impairment of his freedom than has to date occurred.

The adjudication sought under the Juvenile Delinquent Act is in theory non-criminal, but, as pointed out by the court in In re Poff, 135 Fed. Supp. 224 at page 225:

> "I cannot overlook the ultimate function of the Juvenile Court is to determine the guilt or innocence of the individual

in order to make an adjudication of whether he is delinquent."

It is also difficult to make the defendant and his parents understand that the defendant has not been found guilty of a crime. The defendant has not been incarcerated, or removed from the custody of his family. He and his parents are not seeking a lighter punishment for him. They are bound together in seeking to remove the judgment of guilty from his name.

The purpose of the Juvenile Delinquent Act under which the defendant was tried is to promote his welfare, to strengthen his family ties, to educate him, to protect him, to care for him.

"The fundamental philosophy of juvenile court law is that a delinquent child should be considered and treated not as a criminal but as a person requiring care, education, and protection. . . . (T)he primary function of juvenile courts, properly considered, is not conviction or punishment for crime but crime prevention and delinquency rehabilitation."

Thomas v. United States, 121 Fed. 2d 905.

(See also: In re Lewis, 11 N. Y. 217, 224 (1953), decision by the Honorable Justice Brennen, now

Justice of the Supreme Court of the United States;

White v. Reid, 126 Fed. Supp. 867, at page 870.)

It does not serve the purpose of this Act to let the defendant avoid the authority of the court, if the use of this authority is warranted. But neither does it serve the purpose of this Act, or the interest of justice under this Act, for the court to bind the juvenile and his family together with the stigma of untrue guilt.

At his trial, the defendant failed to appreciate the date on which it was charged that he committed crime. Because of this, the trial court was denied vital evidence which would have demonstrated his innocence. He has, instead, been found guilty on the unsubstantiated word of that locally noted drinker and purveyor of soft, medium and hard drink, Primo Lira. The newly revealed evidence would clearly affect the decision of the court in a material manner. In this appeal, the defendant does not seek to be judged innocent, although he is innocent. He seeks a new trial, in order that he may, with a full understanding of the charge that has been made against him, submit his evidence to the judgment of the court. He is confident that such court, with all the facts available, will dismiss the charge and vindicate him.

V

CONCLUSION

This appeal is made on behalf of defendant, Daniel Roy Perez from a judgment rendered against him and a finding that he did commit the offense of juvenile delinquency by uttering a check with a forged endorsement, knowing it to be false.

The factual background of the case shows that the evidence presented by the plaintiff, and chiefly relied upon by the court in making its decision, goes to two main points. The witness, Primo Lira identified the defendant as the person who presented the check to him for payment. The witness Mr. Primo Lira testified that the defendant never returned to the store after the time that the check was cashed by him. The conclusion reached on this point by the court was that the defendant's failure to appear was circumstantial evidence of his "form of flight". It was expressly stipulated that defendant's handwriting was not the same as that of the original, and only endorsement the check bore until Lira negotiated it with a beer truck driver.

Defendant's present counsel made a motion for a new trial, and a hearing was had by the trial court. The new trial was urged on the basis of newly discovered evidence and in the interest of justice.

The new evidence was in the form of sworn

affidavits by Daniel Perez, Frank Gomez, and Louie Ocana and are before this court. The affidavits disclose that the defendant was under a misapprehension that he was charged with passing the check in August of 1960, and not in August of 1959; that the defendant had traded many times with Mr. Lira after August of 1959; that he had been entertained by Mr. Lira in his home in December of 1959; that the only time defendant had ever been accused of cashing a "bad check" by Mr. Lira in all of these times was in the summer of 1960; and that Lira thereafter withdrew such accusation and stated that he had been mistaken.

The trial court refused to grant the motion for a new trial. The appellant respectfully contends that the court was in error in denying this motion.

The appellant respectfully submits that the court erred in not granting the motion on the basis of newly discovered evidence. The evidence offered by the defendant was material because it impeached the plaintiff's sole material witness, and overcame the circumstantial evidence of the defendant's flight. The evidence offered was likely to produce a different result at the trial. The evidence was newly discovered by the defendant in that he did not comprehend the date on which it was alleged he had done the acts which he was charged. In the light of the Act under which he was tried, and the role of the court in handling juveniles under this Act, the mistake of the defendant does not show such a lack of diligence as should prevent

No. 17426.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

DANIEL ROY PEREZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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No. 17426.

IN THE

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BRIEF OF APPELLEE.

Jurisdictional Statement.

On January 30, 1961, appellant executed a consent to proceeding under the Federal Juvenile Delinquency Act pursuant to the provisions of Title 18, United States Code, Sections 5031-5034 [C. T. 4].* On the same date, an Information was filed by the United States Attorney in the United States District Court for the Southern District of California, Central Division, charging appellant with being a juvenile delinquent and committing the offense of juvenile delinquency, in that, with intent to defraud the United States, he uttered and published as true a certain U. S. Treasury check, bearing forged endorsements of the payees thereon, as appellant well knew [C. T. 2]. After arraignment and his plea of not guilty, appellant,

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*"C. T." refers to Clerk's Transcript of Record.

having waived trial by jury, was tried by the Honorable Ernest A. Tolin on March 13, 1961, and thereafter was convicted and adjudicated as charged in the one-count Information [R. T. 64]. On March 27, 1961, appellant was placed on probation for the period of his minority, which was to expire on December 25, 1963 [C. T. 5A]. On March 29, 1961, a motion for a new trial was filed in the District Court [C. T. 6], and on April 3, 1961, such motion was noticed for hearing [C. T. 8]. On April 17, 1961 and on May 1, 1961, the motion was heard by Judge Tolin, argued by counsel, and was denied [R. T. 86].

Jurisdiction of the trial court was based on Title 18, United States Code, Sections 3231 and 5031-5033, inclusive. Jurisdiction of this Court is based on Title 28, United States Code, Sections 1291 and 1294(1).

Statement of the Case.

Insofar as not stated in the jurisdictional statement the case is as follows:

Appellant has raised three points on appeal in the Topical Index of his brief:

> ". . . II Evidence was submitted in connection with the motion for new trial which removed the element of 'Flight' from the case, and showed that witness Lira was unreliable.
>
> "III The trial court committed serious error in not granting the motion for new trial—the offered evidence, if believed by the trier of fact, would exonerate Perez, by destroying the circumstantial evidence against him and impeaching the sole material witness' direct evidence.

"IV The court has erroneously failed to grant the motion for new trial in the interest of justice as it does not serve the purpose of justice, or of the Act under which he was tried, for the juvenile defendant to be found guilty because he failed to comprehend the date on which it was said that he committed his crime." . . .

Statutes and Rule Involved.

Title 18, United States Code, Section 495, provides, in pertinent part, as follows:

". . . Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; . . .

". . . Shall be fined . . . or imprisoned . . ."

Title 18, United States Code, Section 5032, provides as follows:

"A juvenile alleged to have committed one or more acts in violation of a law of the United States not punishable by death or life imprisonment, and not surrendered to the authorities of a state, shall be proceeded against as a juvenile delinquent if he consents to such procedure, unless the Attorney General, in his discretion, has expressly directed otherwise.

"In such event the juvenile shall be proceeded against by information and no criminal prosecution shall be instituted for the alleged violation."

Title 18, United States Code, Section 5033, provides as follows:

> "District Courts of the United States shall have jurisdiction of proceedings against juvenile delinquents. For such purposes, the court may be convened at any time and place within the district, in chambers or otherwise. The proceeding shall be without a jury. The consent required to be given by the juvenile shall be given by him in writing before a Judge of the District Court of the United States having cognizance of the alleged violation, who shall fully apprise the juvenile of his rights and of the consequences of such consent. Such consent shall be deemed a waiver of a trial by jury."

Rule 33, Federal Rules of Criminal Procedure, Title 18 United States Code, provides as follows:

> "The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period."

Statement of Facts.

Appellant and appellee entered into a stipulation of facts at the outset of the trial [R. T. 4-5],* which in essence was as follows:

That U. S. Treasury check No. 16,267,614 made payable in the amount of $72.00, to Porfirio M. and Marceline M. Andrade, was drawn over Symbol 9012 as a Social Security check;

That said check was never received by either of the payees;

That neither of the payees endorsed said check with either of their names;

That neither of the payees authorized anyone else to endorse either of their names;

That the check in fact bore the purported endorsements of both of the named payees on the reverse side thereof;

That the check was cashed at the Belvedere Park Grocery, 522 North Brannick, Los Angeles, California, which second endorsement also appeared on the reverse side of the check;

That a handwriting analysis had been made of the purported endorsement and compared with exemplars of the appellant's handwriting and that such analysis indicated that the spurious endorsement was not signed or written by the appellant.

The issue was thus narrowed for the trial court as to whether or not appellant in fact uttered and published the check as charged.

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*"R. T." refers to Reporter's Transcript of Proceedings in the trial court.

Primo Lira is the owner of the Belvedere Park Grocery in East Los Angeles. Mr. Lira testified that appellant came into his store during August of 1959 and presented a check to his clerk in order to pay for some soda pop and candy [R. T. 12, 13]. Lira, who was standing nearby, recognized appellant as a customer who had been in the store often [R. T. 13]. When the clerk handed Lira the check for his approval, Lira asked the appellant "whose check is this?" [R. T. 13]. The appellant told him that it was his uncle's and that he had worked in his uncle's yard helping to take a tree out and that the uncle had given him the check [R. T. 13]. Lira did not ask appellant for any identification inasmuch as ". . . I knew him. He used to come over there and trade all the time" [R. T. 22].

Lira further testified that although he recognized appellant as a customer he did not learn his true name until after the check was cashed and one of the boys working in the store told him the name [R. T. 19].

Lira further noted that "before he cashed the check I used to see him two or three times a week . . . not afterward. He used to come with some other boys and he used to be in the car outside and the other boys used to come in the store and buy some merchandise . . . after the check was cashed . . ." [R. T. 17].

Appellant's attorney sought to have Lira admit alleged prior inconsistent statements wherein he was supposed to have told the Secret Service agent that appellant had not been in the store the day the check

was cashed and also that he had told some other person or persons that appellant had written his name or something else on the back of the check [R. T. 28]. Lira denied ever making such a statement or statements and no further testimony or evidence was thereafter introduced to rebut his denial [R. T. 28]. Lira's daughter was also present in the store on the day the check was cashed and saw appellant and thereafter observed her father walking by her with a check in his hand [R. T. 43, 51]. Inasmuch as she was in another part of the store behind the meat counter, she was unaware of any further details [R. T. 48, 51].

Appellant's attorney sought information from Lira's daughter about his alleged drinking on the day in question [R. T. 46, 48]. In response to the question, "Had your father been drinking that day?" She responded, "Not that I remember." [R. T. 48]. No further evidence was sought to be introduced on this point.

Secret Service Agent Kenneth B. Thompson testified that he interviewed Lira and his daughter on June 20, 1961, and that earlier on January 6, 1961, he interviewed appellant at his home during the morning in the presence of appellant's mother. At this time appellant disclaimed knowledge of any facts relating to the subject check or that he knew where the Belvedere Park Grocery was, or that he had ever been there [R. T. 8, 9, 10, 11]. Subsequently, at a later interview the same day Thompson, appellant and appellant's

mother drove to the subject market and while enroute appellant remembered where the particular market was and admitted that he had been there many times [R. T. 9, 11].

Appellant testified that he had never seen the subject check prior to having been shown same by Agent Thompson [R. T. 62]. He also denied taking the check to Lira's market or cashing it or telling Lira anything about chopping wood for an uncle [R. T. 58]. Appellant testified further that Lira identified him when Thompson took him to the market and that Lira said at that time, referring to Appellant, "That is the one that cashed the check." [R. T. 58]. He further testified that "I told him it wasn't I and that I had never cashed a check there. I had told him to be sure if he had ever been drinking, maybe sometimes that would happen, why should he accuse me." [R. T. 58, 59]. Appellant explained that he had gone into Lira's store "mostly on week-ends . . . to buy beer" and also occasionally during the week [R. T. 59, 60, 61]. On cross-examination, appellant admitted knowing one of the payees, Porfirio Andrade, and that Mr. Andrade lived about three doors away from him and that Andrade could hardly talk or walk [R. T. 59, 60]. He testified that although he had never seen Lira drink, he had seen him "drunk" on *one* occasion when he was making a purchase at the store [R. T. 61].

Appellant was the only defense witness at the trial and at no time was any reference made to either of the

two affiants who subsequently submitted affidavits which were used by appellant in his motion for a new trial.

Summary of Argument.

Appellant attempted to introduce, as the basis for a motion for new trial, information concerning events and attitudes of himself and a key government witness, which information, by its very nature, must have been available to him long before his trial in the District Court. At most, this information, even if found to have been unavailable to appellant, after due diligence in being advised of same, would have been cumulative of evidence already presented during the trial or an attempt to impeach the government's witness. Such would-be testimony was properly excluded from the court's reasoning, in its determination to deny the motion, based on its belief that the evidence at the trial had proven appellant's guilt beyond a reasonable doubt.

ARGUMENT.

I.

The Sole Question Raised on Appeal Is Whether or Not the Trial Court Erred in Not Granting Appellant's Motion for New Trial Based on Certain Alleged Newly Discovered Evidence.

Appellant's original motion dated March 28, 1961, included five grounds on which appellant based said motion [C. T. 6]. Of those five grounds appellant has chosen to assign error to the trial court in its denial of the motion solely on the basis of the fifth ground, which reads as follows:

> ". . . 5. Newly discovered evidence which could not on the exercise of reasonable diligence have been adduced at the time of trial." [C. T. 6].

None of the five grounds of appellant's motion claimed that a new trial should be granted to appellant "in the interest of justice" and such contention cannot be raised for the first time on appeal.

Although appellant has stated in his notice of appeal that he was appealing "from the above judgment and from the order denying motion for a new trial" [C. T. 24], no effort has been made in appellant's Brief to assign error to the trial court arising out of the actual trial of the case.

The sole remaining issue for this Court to determine is whether or not the trial court made an improper decision in denying appellant's motion for a new trial based on certain "newly discovered evidence."

At the time of sentencing appellant, the trial judge told him that:

> ". . . the endorsement was forged and it was just to my mind impossible to come to a conclusion you didn't take the check in there and cash it . . ."; [R. T. 72].

and, prior to denying the motion for new trial, he commented:

> "Now the principal witness was a storekeeper. There was a suggestion in the evidence that he was intoxicated at the time he took this check and hence could not remember correctly or could not observe correctly. It wasn't proven that he was so and it seemed to me there was some corroboration to his story and it tied in with all the other evidence in such a way that the interlocking of evidence established beyond a reasonable doubt that Daniel Roy Perez did utter the forged check." [R. T. 86].

It is submitted that the trial judge properly exercised his discretion in ruling on the motion, and that the attitude of this Court in *Jeffries v. United States,* 215 F. 2d 225, 226 (9th Cir. 1954) should control the outcome of this appeal. It was there stated:

> "It should be noted that the judge who passed upon and denied this motion had tried the case and heard all of the evidence. As in *United States v. Johnson,* 327 U. S. 106, 112 . . . we must say that: 'Consequently, the trial judge was exceptionally qualified to pass on the affidavits'. The trial judge was not obliged to believe the affidavit or to accept it as face value . . . We assume, as the

record requires us to do, that the trial judge in denying the motion, found the facts against the appellant. We hold that such findings are within the competence and discretion of the trial judge who might well conclude that the facts disclosed at the trial were so convincing that Carroll's affidavit was unworthy of credit."

The court further pointed out, quoting from *Johnson* (internally cited, *supra*):

" 'While a defendant should be afforded the full benefit of this type of rectifying motion, courts should be on the alert to see that the privilege of its use is not abused. One of the most effective methods of preventing this abuse is for appellate courts to refrain from reviewing findings of fact which have evidence to support them.' "

II.

The Affidavits in Support of Appellant's Motion for a New Trial Contain Reference to Facts Which Were Well Known to Appellant at the Time of Trial and Do Not Constitute Newly Discovered Evidence Within the Meaning of Rule 33, Federal Rules of Criminal Procedure.

Appellant submitted three affidavits to the trial court as supporting documentation to his motion for a new trial [C. T. 10, 15, 19]. One was his own [C. T. 10] and the other two (of Louis Ocana [C. T. 19] and Frank Gomez [C. T. 15]) were of friends who had known appellant for six and three years, respectively.

The "newly discovered evidence," contained in these affidavits, on which appellant based his motion was, in essence, as follows:

1. That appellant was confused or mistaken as to the date of the offense which he was charged as having committed.

2. That during the Christmas season of 1959, and on other occasions, Primo Lira extended warm hospitality to appellant and his friends and that such hospitality was inconsistent with Lira's testimony: (a) that appellant "had cheated him," and (b) that appellant had not returned to the store after the alleged passing of the check.

3. That Primo Lira "drank".

4. That Primo Lira cursed and used obscenities.

5. That in July of 1960 Primo Lira acknowledged to appellant that he was not the person who gave him "a phony bill" but that "it must have been someone who looks something like . . . (appellant) . . ."

6. That Lira, who sold beer to minors, should be disbelieved as a witness.

7. That subsequent to August 1959, when the check was cashed at Lira's store, appellant and his friends continued to enter the store on numerous occasions.

8. Hearsy testimony from Ocana as to Lira's alleged exculpatory remarks to appellant and as to Lira's drunken state of being.

9. Miscellaneous other statements designed to attack Lira's character.

10. That Lira was drunk on three occasions when one or more of the affiants was in the store and that on such occasions appellant was present.

A. The "Evidence" in the Three Affidavits is Not "Newly Discovered"

The affidavits themselves indicate that the three affiants had been good friends long before the date of the offense charged in the Information. Appellant did not testify himself or offer any testimony or evidence whatsoever regarding any of these newly alleged contentions, other than that he had seen Lira "drunk" once and had gone to his store to purchase beer.

Thus, for the first time, after the completion of the trial, appellant sought to present information as to facts, which if true, were well known by him prior to the trial, and could well have been included, where relevant, as a part of his defense.

In *Shibley v. United States,* 237 F. 2d 327, 332 (9 Cir. 1956), cert. denied, 352 U. S. 873 (1956), rehearing denied 352 U. S. 919 (1956), the court found absence of error by the trial court in its denial of such a motion when the defendant had been aware of the existence of the potential witness, and of what her testimony might have been expected to be and pointed out:

> "One cannot speculate on failure to call a witness and thereafter present such testimony as newly discovered evidence."

Similarly, in *Prlia v. United States,* 279 F. 2d 407, 408 (9 Cir. 1960), the court said:

> "(There was) . . . no showing that the purported 'newly discovered evidence' was not available to the appellant before or during his trial, or discoverable during the more than three months between appellant's arrest and his trial . . .

> (T)here was no showing of due diligence to explain why the evidence proffered after the trial could not have been presented at it. . . ."

See also *United States v. Bertone,* 249 F. 2d 156 (3 Cir. 1957); *Brandon v. United States,* 190 F. 2d 175 (9 Cir. 1951); and *Fiorito v. United States,* 265 F. 2d 658, 659 (9 Cir. 1958).

Appellant claims he and his family were confused as to the date of the offense and that they did not realize that August 1959 was the crucial time rather than August of 1960 as he "imagined." This contention is untenable for numerous reasons: (1) Appellant waived indictment on January 30, 1961, after having been advised of the charges against him regarding an alleged offense occurring on *August 21, 1959,* and he consented to a proceeding against himself under the Federal Juvenile Delinquency Act. He was thereafter arraigned in open court on an Information filed the same day charging him with a violation of the Federal Juvenile Delinquency Act; (2) Appellant pleaded, not guilty to this offense on February 6, 1961; (3) Appellant was represented by retained counsel prior to and during his trial and was present in court during the trial when references were repeatedly made to *August 1959* as the relevant time.

Even if appellant's belated claim of confusion as to the date of the charged offense were true such contention does not explain his failure to rebut testimony at the trial about the offense or to introduce the other matter contained in the various affidavits. Why did appellant testify that he saw Lira drunk only once when the affidavits speak of his presence on three of such occasions? Was the episode of Lira's exculpatory re-

marks or the alleged Christmas Season conviviality forgotten by him during the trial? Certainly these matters would have demanded an explanation from Lira if he were cross-examined on the stand in such regard. To permit an eppellant to read the transcript of the trial, ascertain the weak points of his case, and then seek further relief with a totally new presentation is not the purpose of this type of motion. At the trial the most appellant did was to deny the offense, claim he had seen Lira drunk once, with no attempt to even rebut Lira's testimony that he had not returned to the store after he cashed the check. None of the other suggested "newly discovered evidence" was even hinted at or suggested during the course of the trial. Appellant seeks to explain his failure to use *any* of this "evidence" with this analog:

> "People have walked over oil fields for hundreds of years without anyone appreciating the significance of the lands. So it is with this evidence; no one realized that the apparently mundane facts in the affidavits were significant, the evidentiary content thereof was newly discovered." (A. B. 8.)

Appellee submits that these "oil fields" were gushers, if they existed at all, and appellant would have been soaked with the information.

In *Mejia v. United States,* No. 16873 (9th Cir. 1961), cited by appellant, the defendant at least tried to find his witness and to produce that testimony as evidence for the trial. Here, appellant did nothing until after the conclusion of the trial and the adverse result to him. The "gamesmanship—sporting event" reference in appellant's brief is an improper comparative. *Mejia,* allegedly was in good faith and tried to

produce his witness whereas appellant here has shown no such similar effort. The court pointed out in *Mejia* that if the missing witness, whose testimony was the principle item of newly discovered evidence, had been present at the trial, his testimony, if true, would have established an alibi for appellants. But the court emphasized in its footnote (p. 5 of Slipsheet Decision):

> "We decide this case on the special and peculiar facts here before us and find it unnecessary to state any such broad rule as that expressed by way of dictum in *Cleary v. U. S.*, 9 Cir., 163 F. 2d 748, 749, as follows:
>
> 'It is obvious that if the evidence, so claimed to show the alibi were actually newly discovered, it was a matter for the jury and not for the judge to consider its weight against the testimony of the complaining witness.'"

What appellant has sought to do is to try a new theory of attack against the complaining witness and to rebut the evidence clearly established against him. He did not suffer "the mistake" of inability to accurately describe his alibi witness as was the case with Mr. *Mejia*.

Appellant has further cited *United States v. Johnson*, 149 F. 2d 31 (7 Cir., 1945), in support of his claim for relief. In that case the court noted at page 44, that a new trial should be granted when:

> "(a) The court is reasonably well satisfied that the testimony given by a material witness is false.
>
> "(b) That without it the jury might have reached a different conclusion.
>
> "(c) That the party seeking a new trial was

taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial."

Appellant has referred to this essential language on pages 12 and 13 of his brief and even underlined the last clause. Even if conditions (a) and (b) were clear and plausible, which, it is submitted, they are not, wherein can appellant support the claim of lack of knowledge of Lira's alleged falsity? The affidavits themselves furnish the answer by their very fabric.

It is respectfully submitted that appellant was clearly aware of the existence of all of the facts contended to be newly discovered and that he has not shown true diligence or any diligence or effort whatsoever in marshaling such evidence and presenting it to the court during the trial.

B. The Matter Contained in Each of Appellant's Supporting Affidavits Is at Most Cumulative and an Attempt to Impeach a Government Witness.

The main theme of each of the three affidavits is an attempt to impeach Primo Lira's testimony by showing a tendency on his part: to drink liquor; to sell beer to minors; to be friendly to appellant after the alleged offense; and that he lied when he claimed appellant had not returned to his store as a customer after August 1959. Such testimony, if introduced at a trial could have served but a single purpose. It would be directed not at whether in fact appellant did utter and negotiate the forged Treasury check in question but rather would be an attempt to show that the witness Lira had made a prior inconsistent statement as to what his testimony was at the trial, or that he had

acted contrary to what his behavior might have otherwise been "expected" to be.

The real emphasis of appellant's brief is an attempt to show that the proffered evidence would have impeached Lira ". . . by showing that the truth was not in him . . ." (A. B. 9) or that the appellant had ". . . been found guilty on the unsubstantiated word of that locally noted drinker and purveyor of soft, medium and hard drink, Primo Lira . . ." (A. B. 16).

This Honorable Court has been confronted with this question on numerous occasions in the past and each time has answered in similar terms as those stated in *Pitts v. United States,* 263 F. 2d 808 (9th Cir. 1959), cert. denied, 360 U. S. 919 (1959), wherein it was noted that defendant had not complied with the requirements basic to a proposed offer of newly discovered evidence. At page 810 it was said:

> ". . . Third. It appeared from the motion that the evidence relied on was intended by appellant to show the falsity of testimony given by Simon and to corroborate testimony given by appellant at the trial of this case. Such evidence would have been merely cumulative and impeaching."

See also:

Wagner v. United States, 118 F. 2d 201 (9th Cir. 1941);

Brandon v. United States, 190 F. 2d 175 (9th Cir. 1951);

Balesteri v. United States, 224 F. 2d 915 (9th Cir. 1955);

United States v. Bertone, 249 F. 2d 156 (3rd Cir. 1957).

Appellant points out that:

> "The court judged a 'consciousness of guilt'; do not the true facts reveal a consciousness of innocence?" (A. B. 9.)

Thus far, the only "true facts" are those so found to be true by the trial court. Appellant had ample opportunity to rebut the inference of "flight" referred to by the trial judge at the time of trial yet remained silent. Now he seeks to show that a witness whose testimony supported that finding is unreliable and that he was lying.

Appellant did not claim confusion as to dates during the trial, nor that Lira was mistaken when he testified that appellant had not come into the store with his friends but remained outside in the car subsequent to the time of his offering of the check. The testimony was clear. Such testimony would quickly have reminded appellant and his attorney of the necessity of rebutting such testimony or of introducing evidence to contradict same, if such were factually available and true. Appellant's present contention is weak and based solely on his own statement. Similarly, is this "new evidence" sought to further the already attempted impeachment of Lira, by reference to his alleged drinking activities. This attack was already made during the trial, once by cross-examination of Lira's daughter and again, when on direct examination of the appellant, he testified that he had seen Lira drunk only *once*. Yet the information in the various affidavits contradicts appellant's own testimony. In the affidavits it appears that appellant had seen Lira drunk on at least *three* occasions, not merely *once* as testified by appellant during the trial. This "new evidence" would thus, if be-

lieved, impeach not only Lira but would necessarily impeach appellant's testimony as well.

It is submitted that these affidavits were belatedly offered to accomplish a task once failed and even then by a means which the trial court properly refused to influence its decision as to ruling on appellant's motion. These affidavits were designed solely to be cumulative of certain testimony given by appellant and as a further attempt to impeach the testimony of Primo Lira.

III.

Appellant's Contention That the Motion for a New Trial Should Have Been Granted in the Interest of Justice, to Further the Purpose of the Juvenile Delinquency Act, is Improperly Raised for the First Time on Appeal.

Rule 33 of the Federal Rules of Criminal Procedure provides that "The court may grant a new trial to a defendant if required in the interest of justice". As noted at the beginning of this brief the sole ground presented to the trial court, in appellant's written motion, which was subsequently made the subject of this appeal, was that related to "newly discovered evidence". No contention that the interest of justice required the court to so grant a new trial to appellant was ever raised below. How can the trial court be found to have erred in denying appellant's motion on this ground when such basis was never presented to it for determination?

Even if this court were to consider this issue, an analysis of the background of the allegation negatives the validity of the claim. Appellant entered into much philosophical discussion related to the fact that he was tried as a juvenile and that as such should have re-

ceived certain consideration and treatment different from that of a criminal trial. Appellant concludes his brief with the following comment:

> "The purpose of the Act under which defendant was tried is directed toward the welfare of the juvenile, not to his punishment. It does not serve the purpose of justice under this Act to exercise the authority of the court without allowing the defendant the protection of the court's procedure, in order to insure that he has the fullest possible opportunity to seek the justice which he has been taught to expect." (A. B. 19.)

Appellee is at a loss to follow the syllogism. Merely because the appellant is a juvenile and the Act is directed "toward his welfare" and not his punishment, is it appellant's suggestion that he thus be immune from some form of guidance or rehabilitation or even control if such be found necessary to curb his delinquent behavior? It is clear that a proceeding under the Federal Juvenile Delinquency Act results in the adjudication of a status rather than in the conviction of a crime. Further, a trial under the Act is not a criminal trial and a strict application of criminal rules, procedural or substantive, has been held to frustrate the purposes of the Act. In *United States v. Borders,* 154 Fed. Supp. 214, 216 (N. D. Ala., 1957), it was noted that in order to avoid the stigma of crime and the exact processes of a criminal trial, when dealing with delinquents, that:

> "Constitutional and statutory safeguards respecting defendants in criminal cases do not apply. The Federal Rules of Criminal Procedure, 18 U. S. C. A. . . . likewise do not apply so

far as they are inconsistent with that Act. To sustain an adjudication of delinquency, most of the authorities require the same amount and kind of proof as would be required in an ordinary civil action."

See:

Rule 54(b)(5), Federal Rules of Criminal Procedure.

The aforementioned *Borders,* decision was affirmed in 256 F. 2d 458, 459 (5th Cir. 1958), wherein it was pointed out:

"That it is clear upon the record that the District Judge made adequate provision for looking after and protecting the substantial rights of the defendant under the statute . . . and that there was ample evidence to establish his guilt . . ."

But such matters in discussion are not properly before this court under the ground of the present appeal. No attack is made herein on the adjudication of appellant's status *per se* but rather on the trial court's alleged error in denying appellant's motion for new trial. In fact, the interest of justice has adequately been met by the procedures followed by the trial court and the defendant received every protection to which he was entitled by law or to which he would have been entitled in a criminal trial as an adult. Although these questions, regarding the "interest of justice" aspect of appellant's argument or regarding the peculiarities of a proceeding under the Federal Juvenile Delinquency Act, are thus outside the scope of this appeal, it is submitted that in fact, the evidence before the court properly supported its finding at the time of the trial and

that appellant was not prejudiced because of his youth, or otherwise, either at the trial or at the time of the hearing on the motion for a new trial.

Conclusion.

1. The allegations contained in the various affidavits submitted by appellant in support of his Motion for New Trial did not constitute "newly discovered evidence" within the meaning of Rule 33, Federal Rules of Criminal Procedure.

2. The information contained in these affidavits was at most merely cumulative and an attempt to impeach a Government witness.

3. The trial judge based his denial of Appellant's Motion for New Trial on a familiarity with all facts and testimony which had been presented during the trial, over which he presided.

4. The Motion for New Trial was properly denied.

5. The judgment of the trial court should be affirmed.

Respectfully submitted,

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THOMAS R. SHERIDAN,
Assistant United States Attorney,
Chief, Criminal Division,

J. BRIN SCHULMAN,
Assistant United States Attorney,

Attorney for Appellee, United States of America.

No. 17426

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

DANIEL ROY PEREZ,

Defendant and Appellant.

APPELLANT'S CLOSING BRIEF

Appeal From
The United States District Court For the
Southern District of California
Central Division

BRIAN J. KENNEDY
3440 Wilshire Boulevard
Los Angeles 5, California
DUnkirk 7-3138

Attorney for Appellant
Daniel Roy Perez.

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APPELLANT'S CLOSING BRIEF

I

SCOPE OF THE REPLY

We have read and carefully considered the government's reply brief heretofore filed herein, and will limit this closing argument to a relatively few points, which, in our opinion, compellingly illuminate the merit in Daniel Perez' appeal, and the need for reversal herein.

1. We had urged in the opening brief that the new evidence sought to be offered went

substantively to the evidence upon which the adverse trial court finding had been made.

a. The government responded with the assertion that it was at most a cumulative effort on our part to impeach the complaining witness, Primo Lira -- relying heavily on an inquiry as to Lira's drinking which had been directed at Sophie Chavez on cross-examination.

2. We urged that the tendered evidence was of such significance that if believed by the trier of fact, it would have effectively exonerated the defendant.

a. Somewhat inconsistently, the government seemingly accepted this interpretation. On page 16 of the reply brief, the existence of this evidence is related to oil fields and characterized as a "gusher". Our friends in the oil business assure us that "gushers" are the best kind there are.

3. We urged that the interests of justice would compel that the finding of guilt be vacated and that a new trial ordered.

a. In reply to this point, the government made an extremely interesting, if curious, argument. Its counsel vigorously pointed out that the trial court, too, had had the ability to have vacated the judgment in the interests of justice, and that the mention thereof to the Court of Appeals under the circumstances was improper; that the defendant, when he cries out to this Court for justice, is "raising a new

point on appeal".

Suffice to say, we are confident that this Honorable Court of Appeals will lend an attentive and sensitive ear to a cry for justice. The very urging of such an argument, which at first blush is somewhat disconcerting, gives rise to a comforting afterthought. Perhaps counsel for the government feels that the interests of justice have been somewhat poorly served, and he therefore deems the entire approach as "dangerous ground". In all events, we noted with some satisfaction the absence of any citation of authority for the proposition that the interests of justice could not be considered by the Court in this matter. We further believe that it is "dangerous ground" for appellee.

II

THE NATURE AND CHARACTER OF THE PROFFERED EVIDENCE ARE SUCH THAT THEY WOULD EXONERATE THE DEFENDANT.

The sweep and scope of the evidence proffered by the appellant herein, which the trier of fact never heard, and which we want the trier of fact to hear, is of significance in analyzing the merit of the appeal. Under common sense and under the rule of Megia v. The United States, No. 16873 (C.A. 9, 1961), the evidence in question must be such that it would, if accepted, lead to the exoneration of the defendant. In recognition of that fact, the government has in an extremely interesting

manner attempted to convert a weakness into strength by arguing that such proffered evidence is merely impeachment, and cumulative impeachment at that, apparently being cumulative upon the question asked of Sophie Chavez in cross-examination, on the theory that mere impeachment evidence is not of such force, especially if it appears to be cumulative.

We do not deny that one of the effects of this evidence is to impeach Primo Lira. His statements and those of the affiants cannot all be true. We anticipate that the trier of fact, after seeing and hearing all of the witnesses, will conclude that the affiants are telling the truth. We therefore further anticipate that he will conclude that Lira was not telling the truth, and therefor Lira will be impeached.

However, the impeachment aspects of the evidence is an added or bonus benefit only, it is not the main or chief reason for the offer thereof. The major effect of such evidence is that it serves to eliminate from the case the finding of "flight", which formed so critical a role with the Honorable trial court judge in his decision. As he observed on page 64 of the Transcript, he interpreted the evidence that Daniel Perez stopped trading with Lira after the alleged incident as "striking evidence" of flight. He used this "striking evidence" according to his own recorded statement, to form a basis of his finding of guilt in conjunction with the evidence of Lira. When the evidence of flight, deemed "striking" by the trial court judge, is eliminated, the case becomes the word of one versus that of the other. Even in a

routine civil suit such situations present basically even odds, with the result likely to turn on such matters as which has the burden of proof, who makes the better witness, etc. In a matter criminal in nature, it would seem that the defendant would have a greatly enhanced opportunity for acquittal, particularly where the particular evidence had been given such import. Where the same evidence which removed such element from the case also demonstrated that the chief complaining witness were untruthful in material elements of the case, the defendant would rightly look forward to vindication on short order, if indeed, the charges were not voluntarily dismissed with apologies.

Appellee makes attacks on the evidentiary content of portions of the affidavits which were submitted, but we contend that these attacks are of no concern to this Court. We have never contended that the affidavits, as such, compell the Court to reverse the trial court and order the defendant exonerated; we have always recognized that the affiants will have to testify; state their evidence, stand up to cross-examination, and have their evidence weighed against Lira's. In this case, the prosecutor has an advantage not usually present; he has the statements of these witnesses in detail. He knows who they are, and where they live; a situation which might cause some uneasiness but for the fact that the prosecuting officials are high minded and principled federal officers.

When this confrontation and weighing occurs, we are confident as to the result.

III

THE INTERESTS OF JUSTICE REQUIRE THAT THE PRESENTLY EXISTING JUDGMENT BE VACATED AND THAT A NEW TRIAL BE GRANTED.

The government takes sharp issue with our invocation of the interests of justice on behalf of this youthful defendant; and suggests, on page 22, that young Perez scarcely has complaint if some form of guidance or rehabilitation or even control is found necessary to curb his "delinquent behavior".

The question before the Court has been somewhat begged by the government position, if Daniel Perez acknowledged that he had been guilty of delinquent behavior, which he denies, he would scarcely have cause or reason to complain about the judgment and sentence of the trial court, which was to place him on a probation with an absolute irreducible minimum of controls and supervision until he attains the age of 21 years. Daniel Perez is taking this case up on appeal because he was found guilty when he was innocent, he has no other advantage to gain. As he stated in his affidavit, which is a portion of the Clerk's Transcript on Appeal, he has had it explained to him that if he succeeded in his appeal, obtained a new trial, and were again found guilty, he could and perhaps would receive a more severe penalty. He willingly asks this Court to permit him to trade in this "soft landing" for an opportunity to demonstrate his innocence. The defendant

submits that with all the evidence before it, the trial court would find that he is innocent, and exonerate him from the false charge. The material upon which he would rely is in the record of proceedings now before this Court.

We respectfully submit that Daniel Perez should have that opportunity to clear himself which he so earnestly desires. Megia, heretofore cited and discussed in both opening briefs, demonstrates that this Court is rightly diligent in favor of the accused found guilty on part of the evidence where all of the evidence might well exonerate him. We submit that the attempted distinction of that case by the appellee was no more than an examination of superficial differences without a distinction, and that this case is within the purview of that decision.

IV

CONCLUSION

Defendant and appellant Daniel Perez respectfully submits to this Court that he is not a juvenile delinquent, that he did not cash the Andrade social security check, that he is innocent of the charges which have been leveled against him and upon which he has been found guilty. He further submits that he has at his present command the ability to present to the trier of facts evidence which should be believed and which will be believed, and which will show that he is innocent and which will lead to his exoneration. He asks for the ability to defeat this false charge.

Respectfully submitted,

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Daniel Roy Perez.

No. 17,432

IN THE

United States Court of Appeals

For the Ninth Circuit

OLSON TOWBOAT COMPANY, OLSON STEAMSHIP Co., the Tug "JEAN NELSON", the Barge "FLORENCE",
Appellants,

vs.

JOAO DUTRA,
Appellee.

BRIEF FOR APPELLANT

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JOAO DUTRA,

Appellee.

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

The appellant herein, Olson Towboat Company, a corporation, owned and operated the tugboat "JEAN NELSON" and the barge "FLORENCE". On November 1, 1959 appellee was employed by appellant aboard said tug and barge at Bandon, Oregon. The barge and tug were tied up to the city dock at Bandon, Oregon. After the tug put its tow line to the bridle of the back of the barge, appellee was to take the lines off the barge and let them go. He had put several of the lines off the barge, and the spring line

was next. He picked the line off the bitt, lifted it up and held it in his hands and waited for the man on the dock to tell him to let it go. This particular wire spring line is fastened with a loop at the end which fits over the bitt. The man on the dock told him to let the line go, and as he let it go something cut his finger.

The appellee at no time saw the condition of the wire loop before he let it go and does not know what caused his finger to be cut.

The appellee does not know who owned the particular line that he was handling. There were other tugs that used this municipal dock at which the tug "JEAN NELSON" and the barge "FLORENCE" were docked on this occasion.

Appellee sustained an injury which later resulted in an amputation of the distal end of the right index finger.

STATEMENTS OF POINTS INVOLVED

1. Is the appellee entitled to a verdict for general and special damages from appellant herein merely because of the fact that his finger was cut after he let go a mooring line?

2. Can appellee recover from appellant without showing any condition of negligence on the part of Olson Towboat Company or unseaworthiness on the part of the tug "JEAN NELSON" or the barge "FLORENCE"?

3. Is the District Court entitled to speculate as to the cause of injury to appellee where there was no showing that the appellant owned the wire line and loop, or that there was a defect in the wire loop?

SUMMARY OF ARGUMENT

The case for the appellant is summarized as follows:

1. The trial court speculated as to the cause of injury.

2. The court erred in its Findings of Fact and Conclusion of Law where there was no "scintilla of evidence" to justify them.

ARGUMENT

The appellee relied upon two courses of action, one for negligence and one based upon seaworthiness.

On the negligence course of action, appellee relied upon the Jones Act and the appellee bore the burden of going forward with the evidence on the essential elements of a negligence action, that is the existence of a duty; the negligent violation of the duty by the defendant; and the causal relationship of violation to injury.

On direct examination of appellee by his counsel (at page 26 of the Transcript) appellee recited that after the tug had put its towline to the bridle on the back of the barge, the next duty was to take the spring line

and let it go. The appellee stated that he cast off two lines and the spring line was next, and he testified as follows at page 27 transcript:

"Q. Then what happened?

A. I picked up the line and held on with my hands until—I wait for the man on the dock to tell me to let it go. It's a heavy line. One thing you have a loop, a wire loop.

Q. This wire loop, that's on the end that goes over the bitt on the barge?

A. That's right.

Q. How far did the wire extend?

A. Oh, a fathom—what you call this.

Q. A fathom?

A. Yes. Like this. (Gesturing.)

Q. Extending your hands about three feet?

A. That's right.

Q. Connected to the nylon?

A. That's right.

Q. What happened then?

A. I hold it and wait for them to tell me to let it go.

Q. Who?

A. For the man of the crew also there to help us working that day. He told me 'O.K., let her go' and when I let her go something in my hands cut me and my finger. I didn't see proper because I am in a hurry and blood comes out and I put my handkerchief down here around and keep working but I couldn't do a proper job—in my hand it hurts me. . . ."

On cross-examination of the appellee he recites that he was taking a line off a bitt that was located on the barge and testified as follows at page 35 transcript:

"Q. And did you get the line off the bitt?
A. Yes.
Q. You held it in your hand?
A. By both hands.
Q. It had a loop on it?
A. Yes.
Q. Did you hold it this way, or this way (gesturing)?
A. This way (holding both hands up in front of face (23) palms in).
Q. This way, in the loop?
A. Yes.
Q. In other words—how big was that loop?
A. About this big around.
Q. You had it held with both hands?
A. Yes, both hands.
Q. Was there someone on the dock?
A. Yes.
Q. Who was he?
A. I don't know his name. He's an oiler, that's all I know.
Q. What did he say?
A. Let go.
Q. Let it go?
A. Yes, and I—see the line is straightened out, you got to straighten it out like this, these heavy lines have to straighten out like this at the time you let her go, and it cut me. . . ."

He further stated that he had the line in his hand and held it up in the vicinity of his face and after he let the line go, he noticed his finger was bleeding and further testified as follows at page 38 transcript:

"Q. Did you ever see what the condition of this wire loop——

A. Well——

Q. Just a minute, please. Did you ever see the condition of this wire loop any time before you let it go?

A. No.

Q. You don't even know what it is today, do you?

A. No. I can see more or less what it looks like.

Q. Up to this day you don't actually know what caused your finger to be cut, do you?

A. I know something in the loop.

Q. Do you know what actually caused the tear?

A. Something in the loop to cut my finger.

Q. You never saw anything, did you Mr. Dutra?

A. No, I couldn't see—you got to pick it up fast and let it go.

Q. You don't know whether there was a cut in that wire, or threads loose about that wire, or anything loose, do you?

A. You talk too fast for me. (28)

Q. Well, I will ask you one question at a time. You can't tell me what condition that line was in because you didn't pay any attention to it, did you?

A. I didn't pay any attention?

Q. You didn't see it?

A. I couldn't pay any attention. You have to work fast. There's no time to take a look.

Q. I understand you have to work fast, but my question has nothing to do with that. I am asking a very simple question. Do you ever see the condition of that line or that loop?

A. No.

Q. You don't know whether or not there were any snags or cut wires in there, do you?
A. I didn't see anything.
Q. You didn't see anything?
A. No."

He further stated that his opinion as to the fact that there must have been something wrong with the rope was based upon pure speculation at page 39 transcript:

"Q. So what you are saying, in effect, Mr. Dutra, is because my finger got cut, there must have been something wrong with the wire or part of it——
A. That's right.
Q. ——isn't that what you are telling this Court?
A. Yes, something wrong with the bitt or loop.
Q. In other words, Mr. Dutra, you are guessing there was something wrong with the loop, is that correct?
A. That's right. . . ."

This, in effect, summarizes the testimony of appellee on direct examination and cross-examination. There is not one bit of evidence of any negligence on the part of appellant. To sustain the appellee herewith, the Court would have to infer from the evidence that there was something wrong with the rope. This would be speculation run riot. Speculation cannot supply the place of proof.

Moore v. Chesapeake & Ohio Railroad Company, 340 U.S. 573 at page 578.

In the case of *King v. Nicholson Trust Company,* 46 N.W. 2d 389, 1957 A.M.C. 1888 at page 1892, the court stated:

> "The law is well settled that a case should not be submitted to the jury where a verdict must rest upon a conjecture or guess. See Fuller v. Ann Arbor Railroad Co., 141 Mich, 66; Powers v. Pere Marquette Railroad Co., 143 Mich. 379; and Scott v. Boyne City, Gaylord & Alpena Railroad Co., 169 Mich. 265.
>
> In the case of Lieflander v. States Steamship Company, 1935 A. M. C. 559, 562, 149 Or. 605 (42 P. (2d) 156), a case brought under the Jones Act, the court stated:
>
> 'In determining whether the evidence is sufficient to support the verdict in this case, we are governed by the federal rule as to whether there is substantial evidence tending to show a breach of duty on the part of the steamship company. The scintilla rule has no application.' . . ."

It will be noted in the cause of action for negligence under the Jones Act, appellee charges as follows:

> "respondents, their agents, servants and employees so carelessly and negligently operated said tugboat and barge so as to allow a mooring cable to become frayed and defective and while libellant was handling said cable, it so lacerated his right index finger so as to cause a portion of same to be consequently amputated." (Tr. p. 4.)

As to the cause of action for unseaworthiness, appellee charges in this cause of action as follows:

> "respondents, their agents, servants and employees allowed the aforesaid tug and barge to be unseaworthy in that respondents, their agents, servants and employees failed to supply libellant with a safe place within which to work while he was aboard said barge in that the mooring line was frayed and defective; failed to warn libellant of the dangers to be encountered in handling such a frayed and defective line;" (Tr. p. 6.)

As to the unseaworthiness cause of action, there is no showing of a defective appliance from the evidence adduced. The burden of proof of unseaworthiness rests upon appellee.

> *Freitas v. Pacific Atlantic Steamship Co.,* 218 F. 2d 562.

It will be noted that the original findings of fact and conclusions of law were not signed. The original findings of fact found that:

> "respondents negligently operated said vessels so as to allow the mooring cable to *become frayed* and defective and as a proximate result thereof, libelant in casting off said cable suffered a laceration and amputation of his right index finger at the first joint."

The amended findings of fact and conclusions of law delete the word "frayed" and merely alleged that the mooring cable became defective.

CONCLUSION

It is submitted that the trial court speculated as to the cause of injury, there being no evidence before the Court to substantiate a verdict for appellee in this matter; and secondly that there is not a scintilla of evidence to justify findings of fact and conclusions of law.

It is respectfully submitted that the judgment of the lower court be reversed, with instructions to enter judgment on behalf of appellant as against appellee.

Dated, San Francisco, California,
November 24, 1961.

JOHN H. BLACK,
HENRY SCHALDACH,
Proctors for Appellant.

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Appellee.

BRIEF FOR APPELLEE

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Appellee.

BRIEF FOR APPELLEE

Appellant sets forth three statements of points involved in this appeal.

Regarding point No. 1, it would be more correct to state "is the appellee entitled to a verdict for general and special damages from the appellant herein because of the fact that his finger was cut upon his letting go of a mooring line". There is no question but what the injury happened upon his letting go, or if after he let go, the "after" was a minute fraction of a second upon his letting go and not a minute or five minutes later. There is no doubt that the line was responsible for the cut . . . like a slice . . . like a fillet. (Page 28 of Transcript.)

Regarding point No. 2, appellee did show negligence and unseaworthiness on the part of appellant. Obviously the mooring line was defective and the vessel was unseaworthy because of said defective mooring line and such was the proximate cause of the injury suffered by appellee.

Regarding point No. 3, there is no speculation of ownership of the mooring line by appellant or of a defect in the wire loop, it not being necessary to prove ownership by appellant of a line being used to moor appellant's vessel to the dock and the defect in the line can be inferred by the evidence presented in this case.

ARGUMENT

Evidence was introduced in this case as follows at page 27 of the transcript:

> "A. For the man of the crew also there to help us working that day. He told me 'O.K., let her go' and when I let her go something in my hands cut me and my finger. I didn't see proper because I am in a hurry and blood comes out and I put my handkerchief down here around and keep working but I couldn't do a proper job—in my hand it hurts me."

At page 37 of the transcript: upon cross-examination:

> "A. You have to loose it from the dock. First I leaned down and pulled it out and back and pulled it out the way the guy told me and then let it go. It's heavy. You have to stand back like this. When I let it go it cut my hands."

At pages 38 and 39 of the transcript: upon cross-examination:

"Q. How long did that whole operation take?

A. I don't know. Fast, fast as you can think. You can't do it slow."

* * * * *

"Q. Up to this day you don't actually know what caused your finger to be cut, do you?

A. I know something in the loop.

Q. Do you know what actually caused the tear?

A. Something in the loop to cut my finger.

Q. You never saw anything, did you Mr. Dutra?

A. No, I couldn't see—you got to pick it up fast and let it go.

* * * * *

Q. You didn't see it?

A. I couldn't pay any attention. You have to work fast. There's no time to take a look."

The negligence of appellant and the unseaworthiness of appellant's vessel can certainly be inferred by the court from the above testimony.

As stated in *Cowgill v. Boock,* 19 ALR 2d 405, 218 Pac. 2d 445,

"It is not necessary to establish a cause of action by direct evidence; negligence may be inferred from the facts and circumstances surrounding an accident."

At 20 Am. Jur. Sec. 272, p. 259, it is stated

"in the absence of a statute or a valid contractual provision to the contrary, circumstantial evidence is regarded by law as competent to prove any

> given fact in issue in a civil case and is sometimes as cogent and irresistible as direct and positive testimony."

At 20 Am. Jur. 272, p. 260 it is stated

> "Negligence and freedom from contributory negligence may be shown by circumstantial as well as by direct proof, and to this end in negligence actions any evidence as to the conditions and circumstances leading up to and surrounding the accident out of which the cause of action arose which will throw light upon the conduct of the parties and the care or lack of care exercised by them at the time of the accident is admissible."

In the case now presented before this appellate court, appellee was ordered to cast off a line from the barge to the dock. It was a nylon line but at its end was a wire loop which was the part appellee had to lift off of the bit on the barge and let go when ordered. The whole operation is done fast. You cannot do it slow. Other lines had already been cast off and this was the last one to be let go. The barge normally would be under way as this line in question is cast off. There was no time for appellee as he moved from line to line in casting them off to minutely inspect the condition of each line. It was the nondelegable duty of appellant to furnish said barge with a seaworthy line and one that would not cut appellee's finger upon his casting the same off. The testimony in this case is that upon appellee letting go said line he suffered the injury that gave rise to this lawsuit. There can be no conclusion except that there was a defect in the wire loop which cut appellee's

finger. If there was no defect there would be no cut. The line was being used by the barge upon which appellee was required to work and whether it belonged to the dock or to the barge is of no consequence as it was ship's equipment while being maintained aboard said vessel for the purpose for which it was being used.

The instrumentality (the mooring line) was under the control and management of appellant. Common knowledge and experience creates a clear inference that the accident would not have happened if there was not some defect in the mooring line and obviously appellee's injury resulted from his handling of said mooring line. Thus, all of the elements of res ipsa loquitur are present and this alone creates a rational inference of appellee's negligence and relieves appellee of the necessity of producing evidence of specific acts of negligence. See 46 ALR 2d 1212.

The case of *Petterson v. Alaska S.S. Co., Inc.,* 205 Fed. 2d 478, is determinative of the issues raised by appellant regarding ownership of the mooring line and condition of same at the time of the injury. In the *Petterson* case a block was brought aboard the vessel by a stevedoring company and while being put to a proper use in a proper manner the block broke causing the injuries complained of to Petterson. There was no proof as to the condition of the block prior to its use other than what might be implied from the accident. In the case now presented before this appellate court, the mooring line was part of the ship's equipment while being used and was the instrumen-

tality that caused the injury to appellee and even though there was no direct proof as to the condition of the mooring line at the time that appellee was injured, the condition of same can be implied from the fact of the accident. As stated in the *Petterson* case at page 459:

> "The owner contends that as there was no proof of the unseaworthiness of the block Petterson cannot recover. This contention is without merit . . . and this court may make its own inferences from the facts as found where it does not upset the findings based upon the credibility of the witnesses. If the block was being put to a proper use in the proper manner, as found by the district judge, it is a *logical inference* that it would not have broken unless it was defective—that is, unless it was unseaworthy. (Emphasis added.)
>
> In making this inference we do not rely upon the tort doctrine of res ipsa loquitur, although the result is similar. Res ipsa loquitur is a doctrine of causation usually applied in cases of negligence. Here we are dealing with a specie of strict liability regardless of fault."

See also *Litwinowicz v. Weyerhaeuser Steamship Company,* 179 Fed. Supp. 812.

Appellant relies on the case of *Freitas v. Pacific Atlantic Steamship Co.,* 218 F. 2d 562, however it is appellee's contention that the *Freitas* case is not applicable and is not controlling in this case and at this time.

Appellant further relies on *King v. Nicholson Trust Company,* 46 N.W. 2d 389, 1957 A.M.C. 1888 at page

1892 for his argument that the trial court's judgment was based on speculation. In the *King* case the deceased had fallen to the bottom of a drydock and the question before the court was whether he had fallen from an allegedly defective gangplank that ran from the ship to the top of the drydock or whether he had fallen from some other part of the ship. In the *King* case an inference could be drawn that decedent fell from the alleged defective gangplank by reason of the location of his body on the floor of the drydock but there was evidence also that had he fallen from the gangplank or from the top of the drydock or from the ship that he could have landed where he did. Therefore, the evidence was susceptible to three different inferences. In the case now presented before this appellate court, there is only one inference that can be drawn from the evidence as to how appellee was injured and that is that he was cut by a defect in the line that he was handling.

Appellant relies upon *Moore v. Chesapeake & Ohio Railroad Company,* 340 U.S. 573 at page 578 that speculation cannot supply the place of proof. Again in the *Moore* case the decedent had been employed as a brakeman in respondent's switching yards. Decedent was standing on the foot board at the rear of a tender and his duty was to give signals to the engineer who was operating the train and who could see the decedent's arm and shoulder at all times. The engineer testified that he saw the decedent slump, as if his knees gave way, right himself, then tumble forward to the outside of the track. The engineer made an

emergency stop, but the train ran the length of the tender and about a car length and a half before it stopped. Decedent died as a result of his injuries. Petitioner alleged the negligence was respondent's engineer making a sudden and unexpected stop without warning thereby causing decedent to be thrown from a position of safety on the rear of the tender into the path of the train. The only witness was the engineer who testified as above and that he received no sign to stop and had no reason to stop until he saw the decedent fall. Petitioner failed to prove decedent fell after the train stopped without warning. The evidence showed he fell before the train stopped. The court held that in order to sustain petitioner one would have to infer from no evidence at all that the train stopped when and where it did for no purpose at all, contrary to all good railroad practice, prior to the time decedent fell, and then infer that decedent fell because the train stopped. This would be speculation run riot. In the case now presented before the appellate court, this is what appellant refers to on page 7 of his brief when he said "this would be speculation run riot. Speculation cannot supply the place of proof." However, in the case now presented we do not have to infer an inference upon an inference upon an inference upon an inference upon an inference but only to infer one inference based upon the evidence.

It is to be noted in the *Moore* case that there was a dissent by Justices Black and Douglas who stated "unless we are to require the element of proximate cause to be proved by eye-witnesses' testimony, a rea-

sonable jury certainly could infer from the foregoing facts that the sudden stopping of the engine threw decedent to his death."

CONCLUSION

For the foregoing reasons, it is submitted that the evidence justifies the findings of fact and conclusions of law and that this court should approve the findings made by the district court and affirm the judgment.

Dated, San Francisco, California,
January 3, 1962.

Respectfully submitted,
FRANCIS J. SOLVIN,
Proctor for Appellee.

No. 17,432

IN THE

United States Court of Appeals

For the Ninth Circuit

OLSON TOWBOAT COMPANY, OLSON STEAMSHIP Co., the Tug "JEAN NELSON", the Barge "FLORENCE",

Appellants,

vs.

JOAO DUTRA,

Appellee.

REPLY BRIEF OF APPELLANTS

JOHN H. BLACK,
233 Sansome Street,
San Francisco 4, California,
HENRY SCHALDACH,
68 Post Street,
San Francisco 4, California,
Proctors for Appellant.

No. 17,432

IN THE

United States Court of Appeals

For the Ninth Circuit

OLSON TOWBOAT COMPANY, OLSON STEAMSHIP Co., the Tug "JEAN NELSON", the Barge "FLORENCE",

Appellants,

vs.

JOAO DUTRA,

Appellee.

REPLY BRIEF OF APPELLANTS

Counsel for appellee cites some of the testimony from the transcript of the record at pages 38 and 39, and then cites cases which he claims support his contention that liability exists for negligence and/or unseaworthiness.

The first case cited by counsel for appellee is

Cowgill v. Boock, 218 P. 2d 445.

This case involves a death of a passenger as a result of an automobile accident. In this case the evidence of skid marks, position of the bodies, etc., gave rise to facts and circumstances from which an inference of negligence could be inferred.

However, in the instant case, no such circumstantial evidence exists. There are just no facts or circumstances from which an inference can be drawn.

Counsel for appellee cites the case of

Petterson v. Alaska Steamship Co., Inc., 205 Fed. 2d 478.

In this case the court stated that the vessel incorporated the block brought aboard by the stevedores and it became a part of the ship's equipment, and the court stated that if the block broke, and if it was a faulty block, it became a part of the vessel's equipment, and that the stevedore could recover from the vessel on the grounds of unseaworthiness of the vessel.

In the instant case, there is no unseaworthy condition as there was in the *Petterson* case.

In the *Petterson* case, the court states, at page 479:

> "It is only necessary to show that the condition upon which absolute liability is determined—unseaworthiness—exists. *Mahnich v. Southern Steamship Co.,* 321 U.S. 96. That has been shown here."

That has not been shown in the instant case. That is the fundamental difference.

The other case cited by appellee is

Litwinowicz v. Weyerhaeuser Steamship Co., 179 Fed. Supp. 812.

In this case, improper devices were furnished by the stevedore, to wit: Baltimore dogs. These improper devices made the vessel unseaworthy. The "Baltimore dog" was not being used for the purpose intended. The appellant has no quarrel with the proposition, but it is not applicable to the instant case.

CONCLUSION

It is respectfully submitted that in the brief of appellee, said appellee constantly refers to statements as follows:

> "There can be no conclusion except that there was a defect in the wire loop which cut appellee's finger."

He further goes on and states:

> "If there was no defect there would be no cut."

He further states at page 5 of his brief:

> "Common knowledge and experience creates a clear inference that the accident would not have happened if there was not some defect in the mooring line and obviously appellee's injury resulted from his handling of said mooring line."

Appellee then makes an isolated statement that all of the elements of res ipsa loquitur are present, without producing any cases which show that this case would fall within the doctrine of res ipsa loquitur.

For the reasons set forth in the opening brief of appellant and those matters set forth and discussed in appellee's brief, it is submitted that the findings of fact and conclusions of law are not justified by the evidence, and that this Court should reverse the decision of the District Court.

Dated, San Francisco, California,
February 2, 1962.

JOHN H. BLACK,
HENRY SCHALDACH,
Proctors for Appellant.

No. 17432

United States Court of Appeals

For the Ninth Circuit

OLSON TOWBOAT COMPANY, OLSON STEAMSHIP CO., The Tug "JEAN NELSON," the Barge "FLORENCE,"

Appellants,

vs.

JOAO DUTRA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 4th & Berry, S. F., Calif.—Rec. 8/25/61—Printed 9/11/61

No. 17432

United States
Court of Appeals
For the Ninth Circuit

OLSON TOWBOAT COMPANY, OLSON STEAMSHIP CO., The Tug "JEAN NELSON," the Barge "FLORENCE,"

Appellants,

vs.

JOAO DUTRA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 4th & Berry, S. F., Calif.—Rec. 8/25/61—Printed 9/11/61

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

JOHN H. BLACK,
HENRY W. SCHALDACH,
233 Sansome Street,
San Francisco 4, Calif.,

Attorneys for Appellants.

FRANCIS J. SOLVIN,
79 Post Street,
San Francisco, Calif.,

Attorney for Appellee.

In the District Court of the United States, Northern District of California, Southern Division

No. 28020—In Admiralty

JOAO DUTRA,

Libellant,

vs.

OLSON TOWBOAT COMPANY, OLSON STEAMSHIP COMPANY, the Tug JEAN NELSON, the Barge FLORENCE,

Respondents.

LIBEL FOR DAMAGES

Action Under Special Rule for Seaman to Sue Without Security and Prepayment of Fees (28 U.S.C., Section 1916)

Libellant complains of respondents and for cause of action civil and maritime, of tort and damage, alleges:

I.

Libellant is a seaman pursuing his remedies under the authority of Section 33 of the Merchant Seaman's Act of June 5, 1920, and all amendments thereto, and all other applicable maritime and tort law in the premises.

II.

Upon information and belief and at all times herein mentioned respondent Olson Towboat Company and respondent Olson Steamship Company were and still are domestic corporations duly organized and existing under and by virtue of the laws of the State of California, engaged in the shipping

business as shipowners and/or operators of ships with an office and place of business in San Francisco, California, and within the jurisdiction of this honorable court.

III.

Upon information and belief, that at all times herein mentioned respondent Olson Towboat Company owned or chartered and operated the tugboat Jean Nelson and Olson Steamship Company owned or chartered and operated the barge Florence and such respondents were in possession and control of said tugboat and barge.

IV.

That at all times herein mentioned libellant was employed as a seaman, to wit: A deckhand, by said respondents to work on said tugboat and barge and was acting in the course and scope of his employment. That on or about the 1st day of November, 1959, at or about the hour of 10:30 a.m. of said day, while libellant was engaged in his duties as a deckhand aboard said barge, respondents, their agents, servants and employees so carelessly and negligently operated said tugboat and barge so as to allow a mooring cable to become frayed and defective and while libellant was handling said cable, it so lacerated his right index finger so as to cause a portion of same to be consequently amputated.

V.

That as a result of the negligence of respondents, their agents, servants and employees, libellant suffered an amputation of his right index finger and

said injury has caused and continues to cause libellant great mental, physical and nervous pain and suffering and said injury results in some permanent disability to libellant's general damage in the sum of Seven Thousand Five Hundred Dollars ($7,500.00).

VI.

Solely by reason of the premises and as a proximate consequence thereof, libellant has been disabled, has suffered and will suffer physical pain and mental anguish, has been and will be prevented from attending to his work as a seaman at established wage scales; has lost and will lose sums of money which he otherwise would have earned and has been obliged to undergo medical treatment, care and attention and is still undergoing the same; that he is informed, believes and alleges that there will be permanent residuals resulting from said injury all to his special damage in a presently unascertainable amount, the allegations of which plaintiff prays leave to insert by amendment when fully ascertained.

As and for a Second, Separate and Distinct Cause of Action, Libellant Alleges:

I.

Realleges all and singular, each and every allegations in Paragraphs I, II, III, V and VI of the first cause of action as though set forth herein in full.

II.

While libellant was engaged in his duties as a deckhand and a member of the crew aboard the

barge Florence on or about the 1st day of November, 1959, at or about the hour of 10:30 a.m. of said day, respondents, their agents, servants and employees allowed the aforesaid tug and barge to be unseaworthy in that respondents, their agents, servants and employees failed to supply libellant with a safe place within which to work while he was aboard said barge in that the mooring line was frayed and defective; failed to warn libellant of the dangers to be encountered in handling such a frayed and defective line; failed to set up and maintain proper safeguards and precautions upon said tug and barge and failed to promulgate and enforce proper and safe rules for the safe conduct of libellant's work.

Wherefore, libellant prays judgment against respondents and each of them in the sum of $7,500.00 general damages, for costs of suit and for general relief, that respondents appear and answer the libel herein.

/s/ FRANCIS J. SOLVIN,
Proctor for Libellant.

Duly verified.

[Endorsed]: Filed March 30, 1960.

[Title of District Court and Cause.]

ANSWER TO LIBEL

Comes now respondent, Olson Towboat Company, and answering libelant's Libel on file herein, alleges as follows:

As to the First Cause of Action:

I.

Admits the allegations of paragraph I.

II.

Admits the allegations of paragraph II.

III.

Admits the allegations of paragraph III.

IV.

Admits that libelant was employed as a seaman aboard said vessel, and denies each and every, all and singular, the remaining allegations of said paragraph IV.

V.

Denies the allegations of paragraph V; specifically denies that libelant has been damaged in the sum of $7,500.00 or in any other sum or sums, or otherwise, or at all.

VI.

Denies the allegations of paragraph VI.

As to the Second Cause of Action:

I.

Answering the allegations of paragraph I, respondent refers to all the admissions, denials and allegations contained in its answer to the first cause of action, and incorporates the same herein by reference thereto as if the same were set forth herein in full.

II.

Denies the allegations of paragraph II.

As and for a Second Separate and Distinct Answer and Defense to Said Libel and Each of the Causes of Action Contained Therein, respondent alleges that libelant was guilty of carelessness and negligence in and about the matters and things set forth in his Libel, in that said libelant failed to make reasonable use of his natural faculties, including that of eyesight, so that any and all of the injuries and damages claimed to have been sustained by said libelant were solely and proximately caused by his own carelessness and negligence in the premises.

Wherefore, respondent prays that the said libel be dismissed and that respondent have its costs of suit herein incurred.

/s/ JOHN H. BLACK,

/s/ HENRY W. SCHALDACH,
Proctors for Libelant.

Duly verified.

[Endorsed]: Filed June 2, 1960.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND FINAL DECREE

The above-entitled cause having come on regularly for trial in this Court, before the Honorable

Michael J. Roche, United States District Judge, libelant appearing by his proctor, Francis J. Solvin, Esq., and respondents appearing by its proctors, John H. Black and Henry W. Schaldach, Henry W. Schaldach appearing, and oral and documentary evidence having been introduced and the cause having been submitted to the Court for its decision and the Court being fully advised in the premises now makes the following findings of fact and conclusions of law, and renders the following judgment and decree:

Findings of Fact

1. At all times mentioned herein libelant was a seaman and the Court has jurisdiction of said cause of action under the authority of Section 33 of the Merchant Seaman's Act of June 5, 1920, and all amendments thereto.

2. That on November 1, 1959, respondent Olson Towboat Company and respondent Olson Steamship Company were domestic corporations duly organized and existing under and by virtue of the laws of the State of California, engaged in the shipping business as shipowners and operators of ships with an office and place of business in San Francisco, California, and within the jurisdiction of this Court.

3. That on November 1, 1959, respondents owned or chartered and operated the tugboat Jean Nelson and the barge Florence and operated same on the navigable waters of the United States, to wit, in the Port of Bandon, Oregon.

4. That on November 1, 1959, libelant was employed by respondents to work on said vessels as a deckhand and was acting in the course and scope of his employment.

5. On said date respondents negligently operated said vessels so as to allow the mooring cable to become frayed and defective and as a proximate result thereof, libelant in casting off said cable suffered a laceration and amputation of his right index finger at the first joint.

6. On said date respondents allowed said vessels to be unseaworthy in that said respondents failed to supply libelant with a safe place within which to work aboard said barge and failed to provide libelant with a safe and proper mooring cable in that said line was frayed and defective and libelant in casting off said mooring cable suffered a laceration and amputation of his right index finger at the first joint.

7. That respondents' negligence and the unseaworthiness of said vessels were the proximate cause of libelant's injuries.

8. That libelant has been damaged by said injuries in the amount of $3,500.00.

Conclusions of Law

From the foregoing findings of fact, the Court makes the following Conclusions of Law:

1. This Court has jurisdiction of the action by reason of Section 33 of the Merchant Seaman's Act of June 5, 1920, and all amendments thereto.

2. As a direct and proximate result of the negligence of respondents and the unseaworthiness of said vessels, libelant was damaged in the sum of $3,500.00.

Decree

In accordance with the foregoing findings of fact and conclusions of law, it is Ordered, Adjudged and Decreed that libelant Joao Dutra, have and recover from respondents Olson Towboat Company and Olson Steamship Company the sum of $3,500.00 damages, together with costs of suit incurred herein in the sum of $.....

Dated this .... day of April, 1961.

....., U. S. District Court Judge.

Certificate of Service by Mail attached.

Lodged April 5, 1961.

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS AND REQUEST FOR A SETTLEMENT OF FINDINGS

Respondents herein, Olson Towboat Company, object to Findings of Fact and Conclusions of Law as follows:

I.

That Paragraph 5 of the Findings does not state the evidence insomuch as the Findings refer to the fact that the cable was frayed and defective. The evidence is silent on this point.

II.

Respondents object to Paragraph 6 of the Findings in that it states that "said line was frayed and defective." There is no evidence to substantiate this finding.

Respondents herein request the above-entitled Court to set the matter of settlement and findings down for a day certain so that argument may be had upon the Findings, and respondents be given an opportunity to point out the fact that the Findings are not substantiated by the evidence adduced at the trial in the above-captioned matter.

Dated: April 7, 1961.

/s/ JOHN H. BLACK,

/s/ HENRY W. SCHALDACH,
Proctors for Respondents,
Olson Towboat Company.

Certificate of Service by Mail attached.

[Endorsed]: Filed April 7, 1961.

[Title of District Court and Cause.]

OBJECTIONS TO AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND COUNTER-FINDINGS

Respondent herein, Olson Towboat Company, objects to the Amended Findings of Fact and Conclusions of Law, and proposes Counter-Findings of Fact and Conclusions of Law attached hereto:

I.

That there are no facts sufficient for the Court to make a finding in Paragraph 5 that said "respondents negligently operated said vessels so as to allow the mooring cable to become defective * * *"

II.

That there are no facts sufficient to allow the Court to make a finding that "respondents allowed said vessels to be unseaworthy in that said respondents failed to supply libelant with a safe place within which to work * * *"

It is respectfully submitted that the Counter-Findings attached hereto are in all regards proper, and that the Court upon the hearing on the settlement of Findings should sign the attached Counter-Findings of Fact and Conclusions of Law.

Findings of Fact

1. That on November 1, 1959, respondent, Olson Towboat Company, owned and operated the tugboat "Jean Nelson" and the barge "Florence."

2. That on or about November 1, 1959, libelant was employed aboard the said vessels as a deckhand, at or near the port of Bandon, Oregon.

3. That on said date said libelant sustained an injury to the right index finger while in the course and scope of his employment as a deckhand. That said injury was not a result of any carelessness or negligence on the part of respondents herein, nor as a result of any unseaworthiness on the part of the tugboat "Jean Nelson" or the barge "Florence."

Conclusions of Law

From the foregoing Findings of Fact the Court makes the following Conclusions of Law:

1. That the said Libel herein be, and the same is, hereby dismissed.

2. That there is no carelessness or negligence on the part of respondents or unseaworthiness on the part of the tug "Jean Nelson" or the barge "Florence."

Dated:

. . . . . .

Judge of the United States District Court.

Decree

In accordance with the Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed that the Libel herein be dismissed, and that libelant take nothing by his said Libel.

Dated:

. . . . . .

Judge of the United States District Court.

Certificate of service by mail attached.

Lodged May 8, 1961.

[Title of District Court and Cause.]

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND FINAL DECREE

The above-entitled cause having come on regularly for trial in this Court, before the Honorable Michael J. Roche, United States District Judge, libelant appearing by his proctor Francis J. Solvin, Esq., and respondents appearing by its proctors John H. Black and Henry W. Schaldach, Henry W. Schaldach appearing, and oral and documentary evidence having been introduced and the cause having been submitted to the Court for its decision and the Court being fully advised in the premises now makes the following findings of fact and conclusions of law, and renders the following judgment and decree.

Findings of Fact

1. At all times mentioned herein libelant was a seaman and the Court has jurisdiction of said cause of action under the authority of Section 33 of the Merchant Seaman's Act of June 5, 1920, and all amendments thereto.

2. That on November 1, 1959, respondent Olson Towboat Company and respondent Olson Steamship Company were domestic corporations duly organized and existing under and by virtue of the laws of the State of California, engaged in the shipping business as shipowners and operators of ships with an office and place of business in San Francisco, California, and within the jurisdiction of this Court.

3. That on November 1, 1959, respondents owned or chartered and operated the tugboat Jean Nelson and the barge Florence and operated same on the navigable waters of the United States, to wit, in the Port of Bandon, Oregon.

4. That on November 1, 1959, libelant was employed by respondents to work on said vessels as a deckhand and was acting in the course and scope of his employment.

5. On said date respondents negligently operated said vessels so as to allow the mooring cable to become defective and as a proximate result thereof, libelant in casting off said cable suffered a laceration and amputation of his right index finger at the first joint.

6. On said date respondents allowed said vessels to be unseaworthy in that said respondents failed to supply libelant with a safe place within which to work aboard said barge and failed to provide libelant with a safe and proper mooring cable in that said line was defective and libelant in casting off said mooring cable suffered a laceration and amputation of his right index finger at the first joint.

7. That respondents' negligence and the unseaworthiness of said vessels were the proximate cause of libelant's injuries.

8. That libelant has been damaged by said injuries in the amount of $3,500.00.

Conclusions of Law

From the foregoing findings of fact, the Court makes the following Conclusions of Law:

1. This Court has jurisdiction of the action by reason of Section 33 of the Merchant Seaman's Act of June 5, 1920, and all amendments thereto.

2. As a direct and proximate result of the negligence of respondents and the unseaworthiness of said vessels, libelant was damaged in the sum of $3,500.00.

Decree

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is Ordered, Adjudged and Decreed that libelant Joao Dutra, have and recover from respondents Olson Towboat Company and Olson Steamship Company the sum of $3,500.00 damages, together with costs of suit incurred herein in the sum of $.....

Dated this 9th day of May, 1961.

/s/ MICHAEL J. ROCHE,
U. S. District Court Judge.

Receipt of copy acknowledged.

Lodged April 28, 1961.

[Endorsed]: Filed May 9, 1961.

Entered May 10, 1961.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Olson Towboat Company, a corporation, respondent above named, hereby appeals to the United States Court of Ap-

peals for the Ninth Circuit from the final judgment entered in this action on May 10, 1961.

/s/ HENRY W. SCHALDACH,

/s/ JOHN H. BLACK,

Proctors for Respondent, Olson Towboat Company, a Corporation.

[Endorsed]: Filed May 15, 1961.

In the United States District Court for the Northern District of California

In Admiralty No. 28020

JOAO DUTRA,

Libelant,

vs.

OLSON TOWBOAT CO., OLSON STEAMSHIP CO., the Tug, JEAN NELSON, the Barge, FLORENCE,

Respondents.

PROCEEDINGS OF TRIAL

Before: Hon. Michael J. Roche, Judge.

Appearances:

For the Libelant:
FRANCIS J. SOLVIN, Esq.,
79 Post Street,
San Francisco, California.

For the Respondents:
HENRY W. SCHALDACH, ESQ.,
233 Sansome Street,
San Francisco, California.

Monday, April 3, 1961, 10:15 o'Clock

The Clerk: Dutro vs. Olson Towboat Company, for trial.

Mr. Solvin: Ready for the Libelant.

Mr. Schaldach: Ready, your Honor.

The Clerk: Will counsel please state their names for the record, please.

Mr. Solvin: Francis J. Solvin, 79 Post Street, Proctor for Libelant.

Mr. Schaldach: H. W. Schaldach, appearing for H. W. Schaldach and John H. Black, for the Respondent.

The Court: All right. Proceed.

Mr. Solvin: If I might make just a very short opening statement to acquaint your Honor with the case that is before your Honor.

The Court: Yes.

Mr. Solvin: This case involves the Libelant, Mr. Dutra, who was injured on November 1st of 1959. At that time, he was serving on the tug, Jean Nelson and the barge, Florence. He was a messman but assigned temporary duty of handling lines because of the fact they were shorthanded. This happened to be in Bandon, Oregon. As [1*] he lifted a nylon line to which was attached on the end a

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

wire loop off of the bit on the barge and picked it up in his two hands to let it go. He did let it go, or it was pulled by another member of the crew who was standing on the shore. This barge, by the way, was tied up to the dock, and in the process of the tug—pulling away by the tug, they were casting the lines, and as he lifted up the wire loop, it had a jagged end, or broken end on the line, or a cut in the wire, and it cut his right index finger, and it evidently sliced off quite a portion, up to the first joint. He immediately took out his handkerchief and wrapped it around his finger and proceeded with his work. When he looked at it later, the Coast Guard was called, and they came and took him to the hospital at Coos Bay. He was hospitalized from November 1st to December 21st, three weeks, during which time they made an incision in his stomach and had his finger there to see if they could perform a grafting operation. That was unsuccessful and he was sent to the Marine Hospital in San Francisco and they amputated the first joint of the right index finger in San Francisco, and he was declared fit for duty on January 6th, 1960. That's the sum and substance of the [2] Libelant's case, your Honor.

Mr. Schaldach: I will wait, your Honor.

The Court: You will wait?

Mr. Schaldach: Yes, I will wait. I have no opening statement to make at this time.

Mr. Solvin: May I proceed, your Honor?

The Court: Yes, proceed.

JOAO PERAERA DUTRA,

Libelant in the above-entitled cause, called in his own behalf, having been first duly sworn, testified as follows:

The Clerk: Would you please state your name for the record.

The Witness: Joao Peraera Dutra.

The Court: You may be seated.

The Clerk: Your full name?

The Witness: Joao Peraera Dutra.

The Court: We will have to have that spelled.

The Witness: J-o-a-o P-e-r-a-e-r-a D-u-t-r-a.

Direct Examination

By Mr. Solvin:

Q. Mr. Dutra, where do you live?

A. Now live in Middletown, California. [3]

Q. Speak up good and loud so everybody can hear you. Middletown, California?

A. Yes, Middletown, California.

Q. Are you married? A. Yes.

Q. Have any children? A. Seven.

Q. And how long have you been going to sea?

A. Oh, I have been in the sea before I was eight years old and I quit the sea and at that time I come to the United States, in '57, and I go back to sea, today, about 4 years.

Q. Now, were you employed as a seaman on or about November 1, 1959?

A. I was employed Olson Tug Company.

(Testimony of Joao Peraera Dutra.)

Q. By the Olson Tug Company?

A. Uh-huh.

Q. And when did you go to work for them?

A. July 12th—June 12th, I mean.

Q. What year? A. 1959.

Q. And in what capacity were you employed? What [4] were your duties? A. Mess boy.

Q. Messman? A. Yes, messman.

Q. What are the duties of a messman?

A. Oh, only clean, keep clean and wash dishes and help the cook, peel potatoes, all this stuff.

Q. And you were employed as a messman from June—when you went to work in 1959 until you were hurt in November of 1959, is that correct?

A. Yes, sir.

Q. Did you—during that time were you called upon to do other duties?

A. They asked me to help them to handle the lines on the barge, Florence.

Q. Had you ever handled lines while you were employed by them prior to that?

A. I believe once or twice, once in a while.

Q. Your other duties—when you went to sea did you handle lines? A. No.

Q. What type of work had you done before when you [5] went to sea?

A. In this country?

Q. In this country and also before that?

A. Before? Fishing.

Q. Fishing. I see. How much were you earning as a messman on November 1, 1959?

(Testimony of Joao Peraera Dutra.)

A. What you mean?

Q. What were your earnings—how much was your salary?

A. Salary? $327.00, plus $2.00 a day, $387.00.

Q. $387.00. Did you get overtime?

A. Yes, it all depends, Sundays and holidays also.

Mr. Schaldach: Mr. Solvin, so that you may—we will stipulate on this. I have his records here, your Honor, from the towboat company for the period that he went on there, July (sic) 12th, up until the date he got off, and some retroactive pay he got. He made, from the period June 12th up to and including—was it November——

Mr. Solvin: What I was going to establish was his monthly earnings on the average. I think I can do it very simply by his income tax statements, Mr. Schaldach, and if you want to still do that, it's all right. Here's the 1959 income tax statement from Shipowners. I show you [6] withholding tax statements for 1959, from Olson Towboat Company, 25 California Street, San Francisco. Are these your earnings you earned in '59?

The Witness: That's right.

Q. And they show a total earnings in '59 of $5,782.33, is that correct? A. That's right.

Mr. Solvin: I'd like to introduce this as Libelant's first in order.

The Court: They may be marked.

The Clerk: Libelant's Exhibit 1.

(Testimony of Joao Peraera Dutra.)

(Thereupon, said withholding tax statement for the year 1959 was marked for identification and entered into evidence.)

Mr. Solvin: During 1959, you were off from November 1st until December 31st? You didn't work November and December, that's when you were injured?

The Witness: That's right.

Q. Were you off some other time in 1959?

A. Some time off.

Q. You say that—was that from May 19th to June 12th? A. That's right.

Q. Why were you off then? [7] A. Strike.

Q. There was a strike during that time and you were out of work? A. Yes.

Q. Then these earnings for 1959 reflect approximately nine months of earnings, is that correct?

A. Yes.

Q. I have here your withholding tax statements for 1960 from Olson Towboat Company and Shipowners & Merchants Towboat Company that show total earnings in 1960 of $4,975.09, is that correct?

A. That's right.

Mr. Solvin: I'd like to submit those as Libelant's next in order.

The Court: Very well.

The Clerk: Libelant's Exhibit 2.

(Thereupon, said tax withholding statements for the year 1960 were marked for identification and entered into evidence.)

(Testimony of Joao Peraera Dutra.)

Mr. Solvin: In 1960, you were off from January 1st until March 28th, is that correct?

The Witness: That's right.

Q. You were fit for duty January 6th? [8]

A. That's right.

Q. Why were you off March 28th?

A. Strike was on.

Q. You didn't go to work then?

A. That's right.

Q. Were you also off for a seven-week period in 1960? A. Yes.

Q. You had no other earnings in 1960 other than those reported here?

A. No, I didn't have anything else.

Q. So your 1960 earnings reflect a period of about seven months of work, is that correct?

A. That's right.

Q. Now, on November 1st, that was the date you were injured in 1959, about what time of the day was it?

A. I believe 10:00, 10:30, 11:00 o'clock. I don't know exactly what time.

Q. In the morning?

A. Yes, in the morning.

Q. Can you tell the judge here just what happened at that time and that day?

A. Yes, the mate told me to take the line from the [9] loop and——

Q. First go back and start from the beginning. You were on the tug in the morning?

A. I see, O.K., yes.

(Testimony of Joao Peraera Dutra.)

Q. Then what happened?

A. I left the tug and went up on this floating dock.

Q. Floating dock, yes. Where was this?

A. In Bandon.

Q. Bandon, Oregon? A. Yes.

Q. All right. Then what happened?

A. So the barge, Florence, was tied up to a dock, city dock, tied up, the boat tied up in the dock and the crew left the tug and walked to this floating dock and you walk a little further and go on the city dock and from the city dock you go in the barge.

Q. You went on the barge? A. Yes.

Q. Who was with you?

A. The first mate, Morall.

Q. The first mate, Morall, his name is Morall?

A. Yes, Morall. [10]

Q. I see. What did the tug do then?

A. As soon as he left the tug came alongside of the barge in the bow and connected the bridles.

Q. In other words, the tug put its tow line to the bridle on the bow of the barge? A. Yes.

Q. What was the next thing you were to do?

A. Take the spring line and let it go.

Q. How many lines were there tying the barge up to the dock?

A. I believe three or four.

Q. Did you cast off any lines?

A. I cast one in the stern and one in the bow.

Q. The spring line was the next? A. Yes.

(Testimony of Joao Peraera Dutra.)

Q. Then what happened?

A. I picked up the line and held on with my hands until—I wait for the man on the dock to tell me to let it go. It's a heavy line. One thing you have a loop, a wire loop.

Q. This wire loop, that's on the end that goes over the bit on the barge? [11]

A. That's right.

Q. How far did the wire extend?

A. Oh, a fathom—what you call this.

Q. A fathom?

A. Yes. Like this. (Gesturing.)

Q. Extending your hands about three feet?

A. That's right.

Q. Connected to the nylon?

A. That's right.

Q. What hapened then?

A. I hold it and wait for them to tell me to let it go.

Q. Who?

A. For the man of the crew also there to help us working that day. He told me "O.K., let her go" and when I let her go something in my hands cut me and my finger. I didn't see proper because I am in a hurry and blood comes out and I put my handkerchief down here around and keep working but I couldn't do a proper job—in my hand it hurts me. I keep working and we get through and go back on the barge and from the barge back on the tug and I tell the second mate I got hurt and we take it off and [12] see how bad it is and the Cap-

(Testimony of Joao Peraera Dutra.)

tain called the Coast Guard and they picked me up out at sea outside of Coos Bay, Oregon.

Q. Did you look at your finger at any time?

A. Not at the time I got hurt because there was too much blood.

Q. Afterward?

A. After I got the job done I looked.

Q. What did it look like?

A. What you mean?

Q. Your finger. A. Now?

Q. At that time?

A. Oh, blood—I got a bad cut, I didn't know how bad.

Q. Like a slice? A. Like a slice?

Q. Like a fillet?

A. Like this. (Gesturing.)

Q. Was the nail still on? A. Yes.

Q. On the palm side of the finger?

A. I hold up the lines like this. They go this way. (Gesturing.) [13]

Q. What did they do with you then, Mr. Dutra?

A. The skipper is supposed to bring me in the tug to Coos Bay but something comes along and the skipper changes his mind, it would take too long so the Coast Guard was called and they came out and bring me in to Coos Bay, Oregon.

Q. What happened in Coos Bay?

A. They take me to the hospital.

Q. What hospital? A. McAuley.

Q. McAuley, M-c-A-u-l-e-y, McAuley Hospital?

A. Yes, McAuley Hospital and——

(Testimony of Joao Peraera Dutra.)

Q. What did—I am sorry—what did they do for you there?

A. Make me treatment, cut me in the stomach and put my finger inside, what you call graft, something like that.

Q. How long did you stay like that?

A. Three days.

Q. Then what happened?

A. They cut me loose and made me treatment every day, every other day for twenty-one days and they say: "You [14] can go down—gave me a slip—go down to the Marine Hospital" and I came down to the Marine Hospital three days later.

Q. In San Francisco?

A. In San Francisco.

Q. What did they do here?

A. Looked at me all the time and decide to cut the end off and be like this.

Q. And then you were released from the Marine Hospital as an out-patient when?

A. December 15th.

Q. December 15th of 1960 and you were told to go back there later?

A. Yes, every week. Once a week.

Q. And you did that? A. Yes.

Q. You came down from where you were living up in Lake County? A. Yes, came down.

Q. How much did it cost you for transportation? Did you drive down or take a bus?

A. My wife brought me down. $5.00 or [15] $6.00 for a trip—it depends on the oil and gas.

(Testimony of Joao Peraera Dutra.)

Q. How many trips down did you make, back and forth?

A. One trip, I have to go in the hospital and go back home again.

Q. And then on January 6th, that was the last trip?

A. The last time, yes, when I been in the hospital.

Q. Maybe this isn't quite clear, Mr. Dutra, I am confused. How many trips did you make from December 15th to January 6th?

A. Three trips.

Q. And then they gave you a fit for duty slip on January 6th? A. That's right.

Q. You could have gone back to work for the company on January 6th if you had wanted to?

A. Yes.

Q. But you didn't? A. No.

Q. Why not?

A. Because it's too far away from home. I got my family there and I have to pay too much transportation. I have to fly and go back for sometimes one day, or two [16] days, fly back or fly down. It costs $35.00 each way and I can't afford that. I got a big family. I got seven kids.

The Court: What?

The Witness: Seven kids.

The Court: You've got what? Seven what?

The Witness: Kids.

The Court: What are their ages? How old are they?

(Testimony of Joao Peraera Dutra.)

The Witness: They are from twelve to one month.

The Court: What do you mean twelve and one month?

The Witness: The first kid is twelve years old.

The Court: Yes.

The Witness: And the youngest now is one month old.

The Court: One month. Who is taking care of the kids today?

The Witness: Today?

The Court: Yes.

The Witness: My mother-in-law.

The Court: Oh, all right. [17]

Mr. Solvin: So the union was on strike during this period of time, is that correct?

A. That's right.

Q. And the only reason that job up there in Oregon was going on was because they had signed a contract with the union? A. That's right.

Mr. Solvin: Now, I would like to introduce also as Libelant's next in order, the medical report from the abstract of the Marine Hospital.

The Court: Did counsel see it?

Mr. Solvin: Yes, he did.

The Court: It may be marked.

The Clerk: Libelant's Exhibit 3.

(Thereupon, said report was marked for identification as Libelant's Exhibit 3 and entered into evidence.)

(Testimony of Joao Peraera Dutra.)

Mr. Solvin: Now, Mr. Dutra, you are claiming then that due to this injury you were off work from November 1st through January 6th, two months and one week?

The Witness: Yes, sir.

Q. That is the period of time you were either an in-patient or an out-patient at the Marine Hospital, is that [18] correct? A. That's correct.

Q. And your earnings, or average earnings, or earnings in 1959 were $5,782.33, and it is your testimony that you only worked approximately nine months in 1959 because you were off two months due to this injury and for almost a month prior to that? A. That's right.

Q. So your average earnings were $642.48 per month, is that correct? A. That's correct.

Q. What, if any, complaints do you have at the present time about this finger?

A. I am feeling badly every time I shake hands with somebody; my work I can't handle too good; I can't write too good, I mean—the finger—I have to write like this (gesturing), I have to shake hands and sometimes in the night I feel some kind of sharp pain like exactly a needle and once in a while it feels funny, little bit funny feeling any time I touch anything.

Q. At the time you were handling this line, were there any gloves supplied to you by the ship? [19]

A. No.

Q. Any gloves you knew about on the ship?

A. No.

(Testimony of Joao Peraera Dutra.)

Q. Your duties were as a messman at that time and still are? This was a temporary——

A. Yes.

Q. Do you now know why they called you out on this? A. Shorthands (sic).

Q. Shorthanded, not enough crew?

A. Yes, not enough men to work.

Mr. Solvin: I have no further questions—except one thing more, your Honor.

The Court: How long have you been in this country?

The Witness: Four years last January 2nd.

The Court: What country are you from?

The Witness: The Azores.

The Court: What?

Mr. Solvin: The Azores, your Honor.

The Witness: The islands. A small island outside—about 2,000 miles away from New York.

The Court: When are you going back? [20]

The Witness: Me?

The Court: Yes.

The Witness: I don't want to any more.

Mr. Solvin: Is there any objection to this?

Mr. Schaldach: Yes, I object on the ground that all the statements contained in this report are contained in his testimony—have already been made by him.

Mr. Solvin: Your Honor, I have here a copy of the Report of Accident or Illness which was made out by Captain Norman Winters, the captain of this vessel. It is a typed copy, not signed or any-

(Testimony of Joao Peraera Dutra.)

thing. I would like to introduce it as Libelant's next in order. It states in it: "While untying a barge——

Mr. Schaldach: Just a moment. I will object to the introduction of this.

The Court: Sorry, but you will have to leave it out.

Mr. Solvin: Very well, your Honor. No further questions then of this witness, this Libelant.

Cross-Examination

By Mr. Schaldach:

Q. Mr. Dutra, you know Captain Winters? [21]

The Witness: Yes.

Q. Who is he?

A. He's the skipper.

Q. On some of the tugs you operate on?

A. Yes.

Q. And on numerous occasions while you were a messman, you asked him to let you do some deckhand work so you could get overtime, isn't that a fact? A. No, sir.

Q. Isn't it a fact, Mr. Dutra, that on November 1st you were one deckhand short?

A. I believe he be two short.

Q. And isn't it further a fact, Mr. Dutra, you again asked him, Captain Winters, if you could go decking so you could get some extra time?

A. No, sir.

Q. That is not a fact? A. No.

Q. You had handled lines before? A. Yes.

(Testimony of Joao Peraera Dutra.)

Q. And this particular line upon which you hurt your hand, at the time that line was looped around a bit—— [22] A. A bit?

Q. Isn't a bit a kind of piece of wood that sticks up along the dock——

A. Not wood, it's steel, it's in the barge.

Q. It's steel. Where was the bit, on the barge?

A. Yes.

Q. Were you on the barge?

A. Yes, I am on the barge, not on the dock.

Q. At the time you hurt your finger, you were on the barge, is that right? A. That's right.

Q. And you were taking this line off of a bit that was located on the barge, is that right?

A. That's right.

Q. And did you get the line off the bit?

A. Yes.

Q. You held it in your hand?

A. By both hands.

Q. It had a loop on it? A. Yes.

Q. Did you hold it this way, or this way (gesturing)?

A. This way (holding both hands up in front of face, [23] palms in).

Q. This way, in the loop? A. Yes.

Q. In other words—how big was that loop?

A. About this big around.

Q. You had it held with both hands?

A. Yes, both hands.

Q. Was there someone on the dock?

A. Yes.

(Testimony of Joao Peraera Dutra.)

Q. Who was he?

A. I don't know his name. He's an oiler, that's all I know.

Q. What did he say? A. Let go.

Q. Let it go?

A. Yes, and I—see the line is straightened out, you got to straighten it out like this, these heavy lines have to straighten out like this at the time you let her go, and it cut me.

Q. In other words, the line went——

A. I let it go.

Q. How far was the barge, the position of the barge [24] you were standing on from the dock?

A. It's close, but the line is like this.

Q. But how far—what was the distance between—— A. I'd say ten or fifteen feet.

Q. ——yourself and the dock?

A. Ten or fifteen feet.

Q. Between yourself and the dock?

A. The dock, yes.

Q. And the man was at the edge of the dock?

A. No, you got me mixed up. From the barge to the dock, yes. From me to the man, longer.

Q. Longer?

A. Yes, because he was what you call oblique.

Q. At an angle?

A. At an angle, whatever you call it.

Q. How long had you been holding this bit—line? A. A few seconds, one or two minutes.

Q. Mr. Dutra, where had you just come from on the barge just before you went over to this bit?

(Testimony of Joao Peraera Dutra.)

A. What do you mean?

Q. What part of the barge had you been on?

A. Up aft. [25]

Q. In the aft——

A. Aft first and I come to the bow.

Q. Which side was the barge moored?

A. Alongside and he told me: "Take the loop off."

Q. And you took the loop off. And you had to bend down?

A. Oh, yes, you have to bend down.

Q. Show me how you did it.

A. Like this (witness bending over). This bit runs this way and you press this way, press it back, pull it back and out.

Q. In other words, the line is taut on the bit?

A. You have to loose it from the dock. First I leaned down and pulled it out and back and pulled it out the way the guy told me and then let it go. It's heavy. You have to stand back like this. When I let it go it cut my hands.

Q. You came from back aft over to this bit?

A. I had a different job, to straighten the lines and wait for the first mate, Morall, to tell me to take the loop off.

Q. Then you went over to where the bit was, is that [26] right? A. That's right.

Q. And the loop around the bit was taut—tight when you first went over there?

A. Yes, it's tight.

Q. Then the man on the dock had to let it loose?

(Testimony of Joao Peraera Dutra.)

A. Yes.

Q. Then would you reach down and pull the loop, pull it back and off the bit? A. Yes.

Q. Then you held it in your hand?

A. Yes.

Q. Then the man said let it go and you let it go? A. Yes.

Q. How long did that whole operation take?

A. I don't know. Fast, fast as you can think. You can't do it slow.

Q. You can't do it slow, you've got to be fast?

A. Yes, you've got to be fast.

Q. And after you let the line go, you noticed your finger was bleeding?

A. That's right. [27]

Q. Is that right? A. That's right.

Q. Did you ever see what the condition of this wire loop—— A. Well——

Q. Just a minute, please. Did you ever see the condition of this wire loop any time before you let it go? A. No.

Q. You don't even know what it is today, do you?

A. No. I can see more or less what it looks like.

Q. Up to this day you don't actually know what caused your finger to be cut, do you?

A. I know something in the loop.

Q. Do you know what actually caused the tear?

A. Something in the loop to cut my finger.

Q. You never saw anything, did you Mr. Dutra?

(Testimony of Joao Peraera Dutra.)

A. No, I couldn't see—you got to pick it up fast and let it go.

Q. You don't know whether there was a cut in that wire, or threads loose about that wire, or anything loose, do you?

A. You talk too fast for me. [28]

Q. Well, I will ask you one question at a time. You can't tell me what condition that line was in because you didn't pay any attention to it, did you?

A. I didn't pay any attention?

Q. You didn't see it?

A. I couldn't pay any attention. You have to work fast. There's no time to take a look.

Q. I understand you have to work fast, but my question has nothing to do with that. I am asking a very simple question. Did you ever see the condition of that line or that loop? A. No.

Q. You don't know whether or not there were any snags or cut wires in there, do you?

A. I didn't see anything.

Q. You didn't see anything? A. No.

Q. So what you are saying, in effect, Mr. Dutra, is because my finger got cut, there must have been something wrong with the wire or part of it——

A. That's right.

Q. ——isn't that what you are telling this [29] Court?

A. Yes, something wrong with the bit or loop.

Q. In other words, Mr. Dutra, you are guessing there was something wrong with the loop, is that correct? A. That's right.

(Testimony of Joao Peraera Dutra.)

Q. Mr. Dutra, that dock that the vessel with the tug was moored to that was in back of the tug, that was a city dock you called it?

A. A city dock.

Q. It's a municipal dock, isn't it? Open to everybody, isn't that right?

A. I believe so. I don't know who it belongs to.

Q. It doesn't belong to the Oliver Olson Company, or the Olson Tug Company?

A. I don't know.

Q. Ever seen other vessels or other tugs——

A. Yes.

Q. ——just a minute please, sir. Have you ever seen on your visits up there, other tugs or barges not belonging to the Oliver Olson Company tied up there?

A. Well, most of the time you go there—I seen before Red Stack.

Q. You saw what? A. Red Stack. [30]

Q. Red Stack moors up there?

A. Yes, Red Stack. Before the Olson Tugs—you have your own tugs—well, it's a complicated, long story.

Q. I am not interested in a long, complicated story. I only want to find out if you saw tugs and barges of other companies there?

A. Yes, when I have been there before.

Q. You have? A. Yes, Red Stack tugs.

Q. And these lines you were handling, or this particular line you were handling, that was a shore line, wasn't it? A. What do you mean?

(Testimony of Joao Peraera Dutra.)

Q. It wasn't removed from the dock and pulled over to the vessel? A. No.

Q. It was moved from the barge over to the dock? A. Yes.

Q. Do you know who owned these lines?

A. No.

Q. You don't know whether they were owned by the Oliver Olson or owned by the dock? [31]

A. I believe so. They belonged to the same company because they tied up the barge.

Q. You don't know who they belonged to?

A. Exactly, I don't know. I feel it belongs to them.

Q. How long were you on this Jean Olson—is that the name of the tug?

A. Jean Nelson and Elizabeth Olson belongs to Olson. Both tugs from June 12th to November 1st.

Q. You were on the Jean Nelson?

A. Elizabeth Olson first and after I moved to the Jean Nelson.

Q. You were on two? A. Yes, two tugs.

Q. And how many trips during the time from June 12th when you first went to work, up until November 1st, did you make up to Bandon, Oregon?

A. I don't know. Three or four times.

Q. Would it be more than five or six times?

A. I couldn't say. Maybe three or four times, I believe.

Q. That's a period of about six months, almost six months, Mr. Dutra? [32]

(Testimony of Joao Peraera Dutra.)

A. No, it isn't six months, June 12th, July, August, September, October, November, yes.

Q. Well, let's call it six months roughly.

A. All right.

Q. Have you made, or did you make on those two tugs, trips up there in excess of six times?

A. Maybe not.

Q. Four times?

A. I can't tell. I don't know exactly how many times. I can't keep it in mind. I have been all along the coast. I can't remember.

Q. You were up there at least on two or three other occasions you know of?

A. Yes, I can remember that.

Q. Did you handle any lines on those other occasions?

A. No, they never called me until the time they called me and I go. It's against the union rules.

Q. You can always work as an extra messman—you have overtime?

A. The time they called me, yes.

Q. You got your maintenance paid to you, didn't you, up to January—up until January 1st? [33]

A. What is maintenance?

Q. Your maintenance money?

A. $8.00 a day, yes.

Q. That's all paid? A. Yes.

Q. Up to January 1st, the time you were declared fit for duty?

Mr. Solvin: January 6th.

Mr. Schaldach: January 6th, fit for duty, all

(Testimony of Joao Peraera Dutra.)

right. You didn't ask anybody for any gloves, did you?

The Witness: No.

Q. Mr. Dutra, during the time, the year 1959, you made $5,782.33 working for Olson and Shipowners, right? A. Yes.

Q. That's what these slips amount to?

A. Olson Tugboat, yes.

Q. You said you were off three months during the 1959 period, was that because of a strike?

A. The strike was—I started work in March, 19—no, May, I mean May.

Q. The reason you were off, you couldn't work was because you were on strike, isn't that [34] right?

A. On a strike, yes.

Q. So you only worked nine months because of a strike during the year 1959?

Mr. Solvin: That's not his testimony, Mr. Schaldach.

Mr. Schaldach: How many months?

Mr. Solvin: His testimony is two months due to the injury in November and December of 1959 and only a period of almost a month due to the strike.

Mr. Schaldach: Two months for the injury and one month for strike?

The Witness: That's right.

Q. But during '60, you were off for three months because of the strike?

A. When I got fit for duty, they offered me a

(Testimony of Joao Peraera Dutra.)

job but I couldn't take it because I live too far away. I had my family and I would spend too much money and I let it go.

Q. You could have gone back to work for Olson, your job was open, but you wanted to be around the Bay Area?

A. I wanted to be around my family. I have to take care of them. [35]

Q. You couldn't get a job here. They were on strike in the San Francisco area?

A. That's right.

Q. And the first time you went back to work was in March? A. In March.

Mr. Schaldach: I have no further questions, your Honor.

Mr. Solvin: I have no further questions, your Honor, and that is the Libelant's case. I will submit the case, your Honor.

The Court: I think you gentlemen can settle this case better than I can. Have you tried to get together?

Mr. Solvin: I have tried, but the offer was such a ridiculous thing I couldn't even consider it.

The Court: I'd advise you to settle it.

Mr. Solvin: You see, this Libelant is just claiming the time he was off work for the period due to the injury, a period of two months and one week. $1,440.00, according to my calculations is what he has lost due to this. In addition to that, he has lost the [36] first joint of his right index finger which is worth a fair amount in general damages, and I

don't think my offer to Mr. Schaldach was out of line. I think it was a fair and realistic offer, but the one he came back with was so unrealistic it couldn't be accepted.

Mr. Schaldach: Before you can charge anybody with any money damages there has to be some semblance of negligence or liability.

Mr. Solvin: I can cite here many, many cases showing there is no question but what this is an unseaworthy ship and appliance, and whether this line belonged to the dock or the ship, the cases all hold it was used as part of the ship's appliances and equipment, and the line was defective. I think the court can certainly follow the line of reasoning that this man was immediately cut and hurt when he let go this line and there obviously had to be a defective condition there in order for it to happen. There is no contributory negligence on his part. He is a messman by trade and not a handler of lines. The ship was unseaworthy and there was no adequate care aboard it and under all these circumstances and the cases, there is no question but that—— [37]

The Court: What did he offer you?

Mr. Solvin: $500.00, your Honor.

The Court: Oh, you can do better than that. I will take a recess so you gentlemen can get together.

Mr. Schaldach: Your Honor, I want to point out this is not a res ipsa case, and there isn't any showing there was anything wrong with this line. This man and counsel are basing it on conjecture and

what might have happened. There isn't any evidence here at all.

The Court: I suggest to you that you use a little patience and do the best you can. There is a challenge in relation to the liability, legally.

Mr. Solvin: Does your Honor want me to argue the liability? I have a slew of cases that bear out my contention that there was not only negligence but unseaworthiness. The condition of this line was certainly defective and as a basis for unseaworthiness, I think all the decisions uphold that this is a——

The Court: I'd like to have you go into your position to take care of the situation so counsel will understand the state of the record at this time.

Mr. Schaldach: The state of this record is [38] this. I am reading almost verbatim from the questions I propounded to the witness. I asked him, your Honor, "Did you ever see the condition of this wire loop before?" The answer is no. I asked him "To this day do you actually know what caused it—what caused the tear? I don't know. Did you look at either of these lines before you took them off? No, I no looked. You never did look at that? No, no." I asked him to describe to me, your Honor, the method in which he took the bit off and the time lapse and time involved and he said he grabbed it, the slack was on it, he pulled it up and pulled it up here, and certainly, your Honor, if he had grabbed it and pulled it up and there had been anything wrong with the wire, any spurring or jaggedness, he certainly would have noticed it.

He brought it up to eye level as he demonstrated and held it until the man on the dock said let it go and then he let it go. It wasn't a letting go where the rope would come around this way and get some other part that he didn't have his hand on, he merely let it go like this. If there had been any spurring there, your Honor, he would have noticed it at that time. That's the state of the record. There is no showing here [39] as to who the line belonged to, the dock or the vessel. That's another hurdle counsel has to get over. The fact it was on the ship doesn't make it the vessel's line. Secondly, the matter of liability is always one of fault or negligence. There is no negligence shown here and no scintilla of unseaworthiness and that's the basis on which I ask the court to consider this matter. There just isn't any liability.

Mr. Solvin: If I may just close, your Honor. This man is operating as a deckhand under the orders of the first mate. He is ordered to pick up this line. He had no time to go down and minutely examine the line. If he had done that he wouldn't have been working very long for a company. The order was to pick it up and let it go which he did, acting under the orders of the mate and his finger was injured. He had no opportunity to go ashore and examine this line and no opportunity to examine it before he picked it up. If every seaman or deckhand or line handler was required to or examined minutely every line before he picked it up, it just wouldn't be feasible. They would be fired, they wouldn't let them stay on the job. As far as

these appliances are concerned, there is [40] an absolutely non-delegable duty to furnish a seaman with non-defective appliances. This case here of Litwinowicz vs. Weyerhaeuser Steamship Company, 179 Fed. Supp. 812 states: "The evidence established that the 'Baltimore dog' was attached to and became a part of the ship's gear. It thus became an appliance appurtenant to the ship. Defendant, under the law could not, by contract or otherwise, delegate to Nacirema the Defendant's duty to the Plaintiffs to provide a seaworthy vessel and appurtenances." That was a case where there was some gear, hoisting gear and it broke while the men were working on the pier. The gear had been supplied by the stevedore company but they couldn't delegate away their duty to furnish these safe appliances. There is liability without fault. Assumption of risk is no defense in this type of case, there is just a non-delegable duty. Unseaworthiness is liability without fault.

The Court: What are the damages in this case. What do you contend?

Mr. Solvin: What I contend to be very fair. He has $1,440.00 in loss of wages and I would say the loss of his finger and the pain and embarrassment and humiliation [41] that goes with it—how old are you, Mr. Dutra?

The Witness: 36.

Mr. Solvin: I'd say a figure of $3,500.00 isn't very much in these times for the loss of a right index finger. I think that's a very realistic and fair amount. So, I'd say $3,500.00 plus the $1,440.00

—I'd say a judgment of $5,000.00, your Honor, is not excessive and not out of line.

The Court: Take a recess and you and counsel get together. Do the best you can and if you can't, I will do the rest.

Mr. Solvin: Thank you, Judge.

(Thereupon, Court recessed for approximately one-half hour at 11:00 a.m.)

The Court: What did I say in the chambers?

Mr. Solvin: $3,500.00, your Honor.

The Court: Enter a judgment for $3,500.00. Prepare the judgment.

Mr. Solvin: Yes, your Honor.

(Court thereupon adjourned at 11:35 o'clock a.m.)

[Endorsed]: Filed May 15, 1961. [42]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, James P. Welsh, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below are the originals filed in the above-entitled case, and that they constitute the record on appeal herein as designated by the respondents.

Libel.

Answer to libel.

Proposed findings of fact and conclusions of law.

Objections to findings and request for a settlement of findings.

Objections to amended findings of fact and conclusions of law and counter-findings.

Amended findings of fact and conclusions of law and final decree.

Notice of appeal.

Designation of record on appeal.

Reporter's Transcript.

Libelant's Exhibits Nos. 1, 2, 3 and 4.

In Witness Whereof, I have hereunto set my hand and the seal of the above-entitled court this 16th day of June, 1961.

[Seal] JAMES P. WELSH, Clerk,

By /s/ C. C. EVENSEN,
Chief Deputy Clerk.

[Endorsed]: No. 17432. United States Court of Appeals for the Ninth Circuit. Olson Towboat Company, Olson Steamship Co., the Tug "Jean Nelson," the Barge "Florence," Appellants, vs. Joao Dutra, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: June 16, 1961.

Docketed: June 30, 1961.

FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 17432

OLSON TOWBOAT COMPANY,

Appellant,

vs.

JOAO DUTRA,

Appellee.

STATEMENT OF POINTS TO BE RELIED UPON UPON APPEAL

Comes now appellant, Olson Towboat Company, a corporation, and recites Statement of Points to be Relied Upon Upon Appeal.

I.

The trial court erred in finding that appellant herein negligently operated said vessels so as to allow the mooring line to become defective.

II.

The trial court erred in finding that appellant herein allowed said vessels to be unseaworthy, and that said appellant failed to supply appellee with a safe place to work aboard said barge.

III.

The trial court erred in finding that the said line was in any way defective.

IV.

The trial court erred in finding that appellant's negligence and unseaworthiness of said vessels were the proximate cause of appellee's injury.

V.

The trial court erred in finding that appellee was damaged in the sum of $3,500.

VI.

The trial court erred in not finding that the mooring cable was not defective.

VII.

The trial court erred in not finding that the vessels were seaworthy.

VIII.

The trial court erred in not finding that appellant supplied appellee with a safe place to work.

IX.

The trial court erred in not finding that the lines provided appellee were not defective.

X.

The trial court erred in not finding that appellee was not entitled to damages.

XI.

That the evidence and the law are against the Findings of Fact and Conclusions of Law, and the

trial court erred in not finding for a judgment in favor of the appellant, and that appellee take nothing by any alleged cause of action contained in his Libel.

/s/ JOHN H. BLACK,

/s/ HENRY W. SCHALDACH,

Proctors for Appellant, Olson Towboat Company, a Corporation.

Certificate of Service by Mail attached.

[Endorsed]: Filed July 26, 1961.

No. 17436

United States Court of Appeals

for the Ninth Circuit

WEYERHAEUSER STEAMSHIP COMPANY,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Southern Division.

Phillips & Van Orden Co., 4th & Berry, S. F., Calif.—Rec. 7-27-61—Printed 8-22-61

No. 17436

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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CHARLES P. MORIARTY,
United States Attorney;

CHARLES W. BILLINGHURST,
Assistant United States Attorney,
324 Federal Building,
Tacoma, Washington,

For Defendant-Appellee.

In the District Court of the United States for the Western District of Washington, Southern Division

No. 2483

WEYERHAEUSER STEAMSHIP COMPANY,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

I.
Nature of Action and Statement of Jurisdiction

Plaintiff brings this action against the United States of America for the recovery of income tax and interest thereon illegally and erroneously assessed and collected from plaintiff for the calendar year ending December 31, 1954 (hereinafter referred to as taxable year 1954). Jurisdiction is conferred upon this Court by virtue of the provisions of Title 28, United States Code, Section 1346(a)(1).

II.
Statement of Facts Applicable to Claim

The facts upon which plaintiff's claim is based are as follows:

(a) Plaintiff is a corporation duly organized under the laws of the State of Delaware on October

16, 1933, with its principal place of business at Tacoma, Washington.

(b) In 1954, plaintiff owned eight dry cargo Liberty Class ships, all in United States registry. Under the market conditions then prevailing, the ships were worth substantially more under foreign registry. In order to permit the transfer of ships to foreign registry, but in limited numbers, the United States Maritime Commission on August 17, 1954, promulgated its "one-for-one" policy. This policy permitted transfer of one ship to foreign registry upon condition that a commitment be made to the Commission, by either the transferor or another shipowner, to retain another ship permanently in United States registry. Because of the increased value of ships transferred to foreign registry, substantial amounts were paid by prospective transferors to shipowners who permanently gave up the right to transfer a ship to foreign registry. Plaintiff executed commitments to perpetually retain four ships in United States registry, and received as consideration therefor the sum of $291,437.50 from other owners of ships who were thereby enabled to transfer four ships to foreign registry. The payor companies, the amounts received for each letter of commitment, and the ships committed are set forth in summary form in Exhibit A attached hereto.

(c) On or about July 15, 1955, plaintiff duly filed its Corporation Income Tax Return for the taxable year 1954 with the Director of Internal

Revenue at Tacoma, Washington, which Return disclosed a net loss. Thereafter, on or about December 15, 1955, plaintiff filed Form 2175, entitled "Statement to be Filed Pursuant to Repeal of Sections 452 and 462 of the Internal Revenue Code of 1954," which Statement disclosed a tax liability for taxable year 1954 in the amount of $10,159.30. A copy of the Return and Statement, together with supporting schedules, is attached hereto as Exhibit B. Said tax liability was fully discharged by payment of the sum of $10,159.30 to said Director of Internal Revenue.

(d) In computing its tax liability, the amount received for the sale of its right to transfer the four ships involved to foreign registry was applied by plaintiff in reduction of the basis of such ships, and was reflected in the depreciation schedules attached to its Returns. No gain was recognized under Section 1001 of the Internal Revenue Code of 1954 because the amounts so received were less than the respective bases of the ships involved.

(e) In a Notice of Deficiency dated December 12, 1958, a copy of which is attached hereto as Exhibit C, the Internal Revenue Service made demand upon plaintiff for additional tax for the taxable year 1954 in the amount of $152,375.28, plus interest thereon. Of said amount, $151,547.50 plus interest of $34,013.07 was predicated upon an erroneous determination that plaintiff had not sold or exchanged capital assets when it engaged in the transactions described in subparagraph (b) above. Said amount

of $151,547.50 represents the additional tax payable if the $291,437.50 received for the commitment letters is properly includible in ordinary income.

(f) Plaintiff complied with said Notice of Deficiency on or about December 23, 1958, by the payment of $152,375.28 additional tax plus interest thereon of $34,198.86, for a total payment of $186,584.14, to the Director of Internal Revenue at Tacoma, Washington. Subsequently, additional interest in the amount of $275.52 was assessed and paid (Exhibit D attached hereto). Of the amounts paid, $151,547.50 represents additional tax and $34,287.10 interest with respect to the letters of commitment transactions. The balance of the tax and interest paid is not in dispute.

(g) On or about February 27, 1959, plaintiff filed with the Director of Internal Revenue at Tacoma, Washington, a claim for refund of tax and interest in the total amount of $186,859.18 theretofore paid in compliance with the aforesaid Notices of Deficiency, and therein demanded the refund of said amount, together with interest as provided by law. A copy of said claim for refund, together with supporting schedule showing the basis thereof, is attached hereto as Exhibit E. As set forth in the preceding paragraph, only $185,834.60 is in issue in this action.

(h) On or about June 30, 1959, plaintiff received a registered Notice of Disallowance of Claim for Refund from the Director of Internal Revenue

Service at Tacoma, Washington, a copy of which notice is attached hereto as Exhibit F. This suit is timely filed, being less than two years after such receipt.

Wherefore, with respect to the letters of commitment transactions, plaintiff prays for judgment against the defendant, United States of America, in the amount of $185,834.60, together with interest thereon as provided by law, and for such other and further relief as the Court may deem proper.

In the alternative, if some portion of the basis of the four ships to which the commitment letters relate is properly allocable to the respective commitment letters, plaintiff prays for judgment against the defendant, United States of America, in such amount as represents the tax computed under Section 1201 of the Internal Revenue Code of 1954 upon the excess of the amounts received for each commitment letter over the basis properly allocable thereto.

/s/ DANIEL C. SMITH,

/s/ OLIVER MALM,

/s/ RICHARD K. QUINN,

Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed November 25, 1959.

[Title of District Court and Cause.]

ANSWER

For answer to the complaint filed herein, defendant admits, denies, and states as follows:

1. Denies paragraph 1, except admits that jurisdiction is invoked under Section 1346(a)(1) of Title 28, United States Code.

2(a). Lacks information sufficient to form a belief as to the truth of the allegations set forth in paragraph 2(a).

2(b). Lacks information sufficient to form a belief as to the truth of the allegations set forth in paragraph 2(b).

2(c). Admits paragraph 2(c), except denies that the amount of tax liability reported and paid was a true tax liability due defendant.

2(d). Lacks information sufficient to form a belief as to the truth of the allegations set forth in paragraph 2(d).

2(e). Denies paragraph 2(e), except admits that a Notice of Deficiency was mailed on or about December 12, 1958, and that Exhibit C is a true copy thereof.

2(f). Admits paragraph 2(f), except lacks information at this time as to whether the balance of the tax and interest paid is in dispute.

2(g). Admits paragraph 2(g), except denies any statement of fact set forth in the claim for refund,

Exhibit E, which is not otherwise expressly admitted in this answer, and further denies for lack of information sufficient to form a belief at this time that the amount of $185,834.60 is the only issue in this action.

2(h). Admits paragraph 2(h).

Wherefore, defendant asks for judgment in its favor together with costs as allowable by law.

Dated: January 15, 1960.

CHARLES P. MORIARTY,
United States Attorney;

/s/ CHARLES W. BILLINGHURST,
Assistant U. S. Attorney.

[Endorsed]: Filed January 19, 1960.

[Title of District Court and Cause.]

PRETRIAL ORDER

As the result of pretrial conferences heretofore had, whereat the plaintiff was represented by Richard K. Quinn, and the defendant by Charles H. Magnuson of the Department of Justice, their attorneys of record, the following issues of fact and law were framed and exhibits identified.

Admitted Facts

I.

This civil action is brought under U.S.C. Title 28, Section 1346(a)(1), as amended, for the re-

covery of income tax and interest assessed by the Commissioner of Internal Revenue against and paid by plaintiff to defendant under the Internal Revenue Code of the United States for the taxable calendar year 1954.

II.

Plaintiff, a corporation duly organized under the laws of the State of Delaware on October 16, 1933, has maintained its principal place of business at Tacoma, Washington, since the date of incorporation up to and including the date hereof. During all of said years, it has filed its Federal tax returns with the Director of Internal Revenue at Tacoma, Washington.

III.

Plaintiff, during the year 1954 and during years prior and subsequent thereto, has engaged in the business of operating a dry cargo steamship fleet in intercoastal trade. As a steamship operator, it is the owner of a number of vessels. During 1954, it owned seven dry cargo Liberty-type vessels, each of which was owned by plaintiff for more than six months prior to the beginning of that year, and each of which was documented under the laws of the United States, and, as such, was an American Flag vessel as required by law for vessels operating in intercoastal trade.

IV.

Sections 9 and 37 of the Shipping Act of 1916, as amended (U.S.C. Title 46, Sections 808 and 835), give rise to the authority under which the Secretary of Commerce, acting through the Maritime Ad-

ministration, exercised control over transfers of vessels documented under the laws of the United States prior to, during the taxable year 1954, and up to and including the date hereof.

V.

Pursuant to such authority, on August 16, 1954, the Maritime Administration promulgated a transfer policy and formula to be used in connection therewith whereby favorable consideration was given to permitting the transfer of a number of dry cargo Liberty-type vessels to foreign registry and flag. (Statement of policy issued August 25, 1954, by Director, Office of National Shipping Authority and Government Aid, outlining formal policy adopted by Maritime Administrator on August 16, 1954, a copy of which is attached hereto and marked "Pretrial Exhibit No. 1.") On December 17, 1954, the Maritime Administration rescinded this policy. (Press release issued December 17, 1954, by Louis S. Rothschild, Maritime Administrator, a copy of which is attached hereto and marked "Pretrial Exhibit No. 2.")

VI.

During the taxable year 1954, plaintiff agreed to retain four of its dry cargo Liberty-type vessels in United States registry in accordance with the then existing Maritime Administration transfer policy in order to permit the owners of four vessels to transfer such vessels to foreign registry for use as foreign flag vessels. For the Court's convenience, a chronological summary of plaintiff's written agree-

ments (herein called collectively "agreements of retention" or "retention agreements") with respect to its vessels follows:

a. Pursuant to an agreement with Intercontinental Steamship Corporation, plaintiff delivered to the Maritime Administration a letter dated November 5, 1954, agreeing to retain its vessel, the W. H. Peabody, in United States registry. This qualified Intercontinental Steamship Corporation to transfer its vessel, the Holystar, to foreign registry. Formal approval by the Maritime Administration of the transfer of the Holystar to Liberian registry was given by Transfer Order dated December 2, 1954. (Copies of the agreement between plaintiff and Intercontinental Steamship Corporation, plaintiff's letter to the Maritime Administration, and the Transfer Order are attached hereto and marked "Pretrial Exhibit No. 3.")

b. Pursuant to an agreement with Marine Shipping, Inc., plaintiff delivered to the Maritime Administration a letter dated November 8, 1954, agreeing to retain its vessel, the F. E. Weyerhaeuser, in United States registry. This qualified Marine Shipping, Inc., to transfer its vessel, the Christos M., to foreign registry. Formal approval by the Maritime Administration of the transfer of the Christos M. to Liberian registry was given by Transfer Order dated December 2, 1954. (Copies of the agreement between plaintiff and Marine Shipping, Inc., plaintiff's letter to the Maritime Administration,

and the Transfer Order are attached hereto and marked "Pretrial Exhibit No. 4.")

c. Pursuant to an agreement with International Navigation Company, Inc., plaintiff delivered to the Maritime Administration a letter dated December 14, 1954, agreeing to retain its vessel, the John Weyerhaeuser, in United States registry. This qualified International Navigation Company, Inc., to transfer its vessel, the Marven, to foreign registry. Formal approval by the Maritime Administration of the transfer of the Marven to Liberian registry was given by Transfer Order dated December 22, 1954. (Copies of the agreement between plaintiff and International Navigation Company, Inc., plaintiff's letter to the Maritime Administration, and the Transfer Order are attached hereto and marked "Pretrial Exhibit No. 5.")

d. Pursuant to an agreement with Global Tramp, Inc., plaintiff delivered to the Maritime Administration a letter dated December 24, 1954, agreeing to retain its vessel, the Geo. S. Long, in United States registry. This qualified Global Tramp, Inc., to transfer its vessel, the Ocean Skipper, to foreign registry. Formal approval by the Maritime Administration was given by Transfer Order dated December 31, 1954. (Copies of the agreement between plaintiff and Global Tramp, Inc., plaintiff's letter to the Maritime Administration, and the Transfer Order are attached hereto and marked "Pretrial Exhibit No. 6.")

VII.

As consideration for its retention agreements, plaintiff received the sum of $291,437.50 from the owners of the four vessels transferred to foreign registry. The payor companies, the amounts received by plaintiff, and the vessels of plaintiff in respect of which such amounts were received are set forth below:

Payor Company	Amount Received	Vessel
Intercontinental Steamship Corporation ..... c/o Triton Shipping, Inc. 80 Broad Street, New York, N. Y.	$ 79,281.25	W. H. Peabody
Marine Shipping, Inc. ..... c/o Triton Shipping, Inc. 80 Broad Street, New York, N. Y.	79,281.25	F. E. Weyerhaeuser
International Navigation Company, Inc. ..... 52 Broadway, New York, N. Y.	66,500.00	John Weyerhaeuser
Global Tramp, Inc. ..... 52 Broadway, New York, N. Y.	66,375.00	Ocean Skipper
	$291,437.50	

VIII.

In computing its Federal income tax liability for the taxable year 1954, plaintiff treated the payments received for retaining its vessels in United States registry as receipts from the sale to others of its rights to foreign transfer in these four vessels and reported the receipts on Schedule D of its Return for the taxable year 1954. Believing that it had sold property rights relative to four of its vessels and that such sale was governed by the provisions of

Section 1231 of the Internal Revenue Code of 1954 and that no part of the basis of any vessel was allocable to the rights sold, it reported no gain from the sale of such rights but applied the receipts in reduction of the tax basis of the respective vessels. This treatment was disallowed by the Commissioner of Internal Revenue and was determined by him to be the receipt of ordinary income.

IX.

1. On or about July 15, 1955, plaintiff duly and timely filed its Corporation Income Tax Return for the taxable calendar year 1954 with the Director of Internal Revenue at Tacoma, Washington, which Return disclosed a net loss. Thereafter, on or about December 15, 1955, plaintiff filed Form 2175, entitled "Statement to Be Filed Pursuant to Repeal of Sections 452 and 462 of the Internal Revenue Code of 1954," which Statement disclosed a tax liability for the taxable year 1954 in the amount of $10,159.30. (A copy of the Return and Statement, together with supporting schedules, is attached as Exhibit B to plaintiff's Complaint in this cause and is incorporated herein by reference.) Said tax liability was fully discharged by payment thereof to said Director of Internal Revenue.

2. In a Notice of Deficiency dated December 12, 1958 (a copy of which is attached as Exhibit C to plaintiff's Complaint in this cause and is incorporated herein by reference), the Internal Revenue Service made demand upon plaintiff for additional

tax for the taxable year 1954 in the amount of $152,-375.28, plus interest thereon. Of said amount, $151,-547.50, plus interest of $34,013.07 represents the additional tax and interest payable if the $291,-437.50 received as a result of the retention agreement transactions is properly includible in ordinary income.

3. Plaintiff complied with said Notice of Deficiency on or about December 23, 1958, by payment to the Director of Internal Revenue at Tacoma, Washington, of $152,375.28 additional tax, plus interest thereon of $34,198.86, for a total payment of $186,574.14. Subsequently, additional interest in the amount of $275.52 was assessed and paid to the Director (Exhibit D attached to plaintiff's Complaint in this cause and incorporated herein by reference). Of the amounts paid $151,547.50 represents additional tax and $34,287.10 interest with respect to the retention agreement transactions and are the amounts at issue in this cause. The balance of the tax and interest paid is not in dispute.

4. On or about February 27, 1959, plaintiff filed with the Director of Internal Revenue at Tacoma, Washington, a claim for refund of tax and interest in the total amount of $186,859.18 theretofore paid in compliance with the aforesaid Notices of Deficiency, and therein demanded the refund of said amount, together with interest as provided by law. (A copy of said Claim for Refund, together with supporting schedule showing the basis thereof, is attached as Exhibit E to plaintiff's Complaint in

this cause and is incorporated herein by reference. Defendant denies each statement contained therein except those herein expressly admitted.) As set forth in the preceding paragraph, only $185,834.60 is in issue in this cause.

5. On or about June 30, 1959, plaintiff received a registered Notice of Disallowance of Claim for Refund from the Director of Internal Revenue at Tacoma, Washington. (A copy of said notice is attached as Exhibit F to plaintiff's Complaint in this cause, and is incorporated herein by reference.) Plaintiff's suit is timely filed, being less than two years after such receipt.

Plaintiff makes the following contentions, each of which is denied by defendant:

Plaintiff's Contentions

1. Sections 9 and 37 of the Shipping Act of 1916, as amended (U.S.C. Title 46, Sections 808 and 835), require the owner of vessels documented under the laws of the United States to obtain prior approval of the Maritime Administration as a condition of transferring either (1) ownership of such vessels to non-citizens, or (2) registry of such vessels to foreign countries. These sections constitute part of a co-ordinated plan devised by Congress to foster and develop a strong American merchant marine in the interests of national security and economy. Their basic purpose is to restrict the transfer of vessels to aliens where such vessels are or may be required for the transportation of cargo

in the foreign and domestic commerce of the United States and for its national defense. They restrict the transfer of vessels which, but for factors peculiar to their special utility in the national economy and defense, would be freely sold or transferred as is other private property. Administration of these sections has been marked with high regard for the status accorded to property rights in the United States Constitution and with recognition of the need for self-restraint in the exercise of the broad authority conferred therein, any arbitrary exercise of which would be inconsistent with the American concept of the rights of private property. (Statement, March 24, 1954, by Louis S. Rothschild, Maritime Administrator, a copy of which is attached hereto and marked "Pretrial Exhibit No. 7.")

2. Consistent with its recognition that the right to transfer or sell vessels without restriction is a valuable property right which may be restrained only where careful deliberation reveals that the paramount interests of national security compel it, the Maritime Administration, during the years prior to August 16, 1954, approved or disapproved of applications for transfer of vessels to foreign registry on a case-by-case basis. In reviewing these applications, consideration was given to a number of factors respecting transfer, including factual data regarding the vessel involved, the effect upon the maintenance of an adequate merchant marine, the effect upon the national defense, and the impact

upon the owner and its employees. (Pages 7-9, Pretrial Exhibit No. 7.)

3. The Maritime Administration adopted its new "one-for-one" transfer policy on August 16, 1954, in recognition of the serious financial difficulties confronting American owners of dry cargo Liberty-type vessels due to their inability to obtain profitable employment for their vessels in competition with low-cost foreign flag operators (Pretrial Exhibit No. 2).

4. The Maritime Administration in years subsequent to December 17, 1954, has continued to recognize the owner's right to transfer and sell vessels except where the interests of national security and economy intervene. (Press release issued November 9, 1955, by Clarence G. Morse, Maritime Administrator, a copy of which is attached hereto and marked "Pretrial Exhibit No. 8.")

5. The right to transfer or sell vessels has been recognized at all times by the United States Maritime Administration as a valuable property right inherent in the ownership of such vessels.

6. When plaintiff executed its retention agreements, dry cargo Liberty-type vessels were worth substantially more in foreign registry than when registered under the American Flag. A primary cause of this difference in value was the marked difference in operating costs between foreign and domestic flag vessels. (Page 8 of the Report of the Water Transportation Subcommittee of the Senate

Committee on Interstate and Foreign Commerce Concerning Whether the Maritime Administrator Has Been Administering Improperly the Law Dealing With Foreign Transfers of American Flag Vessels, a copy of which is attached hereto and marked "Pretrial Exhibit No. 9.") As a consequence of this difference in value, an agreement to retain a vessel in United States registry decreased the value of such vessel, or, alternatively, a vessel to which an agreement of retention had not been executed and which was still available for transfer to foreign registry enjoyed a substantial enhancement in value.

7. By engaging in the retention agreement transtions, plaintiff sold the rights to foreign transfer in four of its vessels, and thereby barred the foreign transfer of such vessels. Subsequent to the cancellation by the Maritime Administration of its "one-for-one" policy on December 17, 1954, plaintiff's obligations to the Maritime Administration to retain the vessels involved in United States registry remained in effect and continued to adversely affect the market value of such vessels.

8. One of the rights, privileges, powers, and immunities inherent in the ownership of any property is the right to sell or otherwise transfer such property. The right to transfer a vessel to foreign registry is a valuable property right which attaches to the ownership of such vessel.

9. In executing the retention agreements, plaintiff sold to others its rights to transfer foreign in

four of its vessels and was thereby entitled to treat the amounts realized as proceeds from the sale of property used in the trade or business and held for more than six months within the meaning of Section 1231 of the Internal Revenue Code of 1954. As no part of the basis of any of the four vessels was allocable to the rights of transfer that were sold, plaintiff properly applied the proceeds of sale as reductions in the respective basis of the vessels involved.

10. Alternatively to the last sentence of the preceding paragraph, if some portion of the basis of each of the four vessels to which the retention agreements relate is found by this Court to be properly allocable to the property rights sold in the respective retention agreements, then the amounts received in excess of the respective bases are entitled to capital gains treatment as receipts from the sale of property used in the trade or business and held for more than six months under Section 1231 of the Internal Revenue Code of 1954.

Defendant makes the following contentions, each of which is denied by plaintiff:

Defendant's Contentions

1. The income tax deficiency assessed by the Commissioner of Internal Revenue and collected from the plaintiff for the taxable year 1954 was proper and no refund is due under the claims asserted in this action.

2. The presumption favoring the correctness of the Commissioner's assessment is fully supported by the facts and law material to this case.

3. The transactions involved in this action did not result in the sale or exchange of property, capital assets or property used in the taxpayer's trade or business within the meaning of Sections 1221 and 1231 Internal Revenue Code of 1954.

4. The payments received by the plaintiff from the various vessel owners for the right to use vessels under foreign registry results in compensation to be treated as ordinary income within the meaning of the Internal Revenue Code.

5. The payments received by the plaintiff for its agreements to retain its vessels in American registry results in compensation to be treated as ordinary income within the meaning of the Internal Revenue Code.

6. Plaintiff's agreements to retain its vessels in American registry were voluntary restrictions of the use of property for which the taxpayer was compensated and the compensation is to be treated as ordinary income.

7. The amounts received by plaintiff under its retention agreements did not reduce the bases of plaintiff's vessels.

8. The lawful act of the Maritime Administration in restricting the right to use property does not cause the basis of such property to be reduced.

9. In viewing transactions for income tax purposes the Court must look to the substance of the acts rather than the terms of the forms used.

10. This action falls within the full meaning and intent of Revenue Ruling 58-296 (1958-1 C.B. 276) which provides:

"Payments received for agreements to retain ships under American registry procured for the purpose of enabling the payors to meet the requirements of the Maritime Administration under the temporary policy in effect between August 16, 1954, and December 17, 1954, so as to be able to transfer like ships to foreign registry, constitute ordinary income and not capital gain. Such an agreement does not constitute a sale or exchange of property. The privilege passing under the agreement is a temporary privilege created and suspended by administrative action of a governmental agency and does not constitute property within the purview of Section 1221 of the Internal Revenue Code of 1954."

Issues of Fact

The following is the issue of fact to be determined by the Court herein:

1. Whether during the taxable year in question and during years subsequent thereto, the market value of dry cargo Liberty-type vessels was substantially reduced as a result of retention agreements, or, alternatively, the market value of dry cargo Liberty-type vessels to which agreements of

retention had not been executed and which were still available for transfer to foreign flag was substantially enhanced.

Issues of Law

The following are the issues of law to be determined by the Court herein:

1. Whether the amounts received by plaintiff as a result of its retention agreements constitute amounts received for the sale of property used in the trade or business and held for more than six months within the meaning of Section 1231 of the Internal Revenue Code of 1954 (as plaintiff contends), or constitute the receipt of ordinary income (as defendant contends).

2. Whether or not a portion of the basis of each of the four vessels to which the agreements of retention relate is properly allocable to the right to transfer to foreign registry.

Stipulation

The parties hereto have agreed as follows:

1. By this Pretrial Order, the parties have attempted to narrowly confine the issues before this Court. If, in reaching a decision on the stated issues of fact and law, it should be necessary for the Court to make separate determinations of fact and law, with respect to peripheral matters, the parties hereto, with the Court's approval, reserve the right to formally express their views with respect to such issues.

2. Should it be necessary, and with the Court's approval, the parties agree to submit a computation of the amount, if any, due plaintiff in accordance with the Court's determination in this cause.

Exhibits

The exhibits of the parties were produced and marked and may be received in evidence, if otherwise admissible, without further identification, it being admitted that each exhibit is what it purports to be. Each party waives the objection that any such exhibit is a copy rather than an original. A list of the said exhibits of both parties is hereto attached to the Pre-Trial Order and made a part hereof by reference.

Plaintiff's Exhibits

1. Statement of policy issued August 25, 1954, by Director, Office of National Shipping Authority and Government Aid, outlining formal policy adopted by Maritime Administrator on August 16, 1954.

2. Press release issued December 17, 1954, by Louis S. Rothschild, Maritime Administrator.

3. Agreement between plaintiff and Intercontinental Steamship Corporation respecting retention of the W. H. Peabody in United States registry, plaintiff's letter to the Maritime Administration, and the Maritime Administration Transfer Order authorizing transfer of the Holystar to foreign registry.

4. Agreement between plaintiff and Marine Shipping, Inc., respecting retention of the F. E. Weyerhaeuser in United States registry, plaintiff's letter to the Maritime Administration, and the Maritime Administration Transfer Order authorizing transfer of the Christos M. to foreign registry.

5. Agreement between plaintiff and International Navigation Company, Inc., respecting retention of the John Weyerhaeuser in United States registry, plaintiff's letter to the Maritime Administration, and the Maritime Administration Transfer Order authorizing transfer of the Marven to foreign registry.

6. Agreement between plaintiff and Global Tramp, Inc., respecting retention of the Geo. S. Long in United States registry, plaintiff's letter to the Maritime Administration, and the Maritime Administration Transfer Order authorizing transfer of the Ocean Skipper to foreign registry.

7. Statement of March 23, 1954, by Louis S. Rothschild, Maritime Administrator.

8. Press release issued November 9, 1955, by Clarence G. Morse, Maritime Administrator.

9. Report of the Water Transportation Subcommittee of the Senate Committee on Interstate and Foreign Commerce Concerning Whether the Maritime Administrator Has Been Administering Improperly the Law Dealing with Foreign Transfers of American-Flag Vessels.

Exhibits B, C, D, E, and F, incorporated in this Pre-Trial Order by reference, are marked and attached to the plaintiff's Complaint on file herein.

Action by the Court

The Court has ruled that:

The foregoing Pre-Trial Order has been approved by the parties hereto as evidence by the signatures of their counsel hereon and by the entry of this Order the pleadings pass out of the case. This Pre-Trial Order shall not be amended except by Order of the Court pursuant to agreement of the parties or to prevent manifest injustice.

Dated at Tacoma, Washington, this 17th day of October, 1960.

/s/ GEO. H. BOLDT,
United States District Judge.

Approved for entry:

/s/ DANIEL C. SMITH,

/s/ OLIVER MALM,

/s/ RICHARD K. QUINN,
Attorneys for Plaintiff.

/s/ CHARLES H. MAGNUSON,
Attorney for Defendant.

[Endorsed]: Filed October 20, 1960.

[Title of District Court and Cause.]

MEMORANDUM DECISION

The money payments received by plaintiff, on which capital gain tax treatment is claimed, were agreed consideration for plaintiff's commitment to the payors not to apply for transfer foreign of specified Liberty ships owned by plaintiff during continuance of a certain ship transfer policy of the United States Maritime Administration. At the time the right to apply for transfer foreign was a valuable incident of the ownership of plaintiff's ships and as such it was a property right.

The question for decision is whether the relinquishment, or forbearance in exercise, of such right was a "sale or exchange of property" qualifying income derived therefrom for capital gain treatment under §1231 of the Internal Revenue Code of 1954. Unless the transactions fully met the requirements of that section the funds thus acquired were ordinary income as defined generally in §61 of the Internal Revenue Code of 1954 and more particularly in subsection (a)(3) of that section: "gains derived from dealings in property."

In the light of legislative intent and purposes stated and applied in the following cited decisions, the property right referred to is not "property" as that term is used in §1231; nor, within the meaning of that section, is a covenant to forbear excercise of such right a "sale or exchange of property," or the equivalent thereof. Commissioner v. Gillette Motor Co., 364 U.S. 130 (1960); Corn Products Co. v. Commissioner, 350 U.S. 46 (1955); Com-

missioner v. Glenshaw Glass Co., 348 U.S. 426 (1955); Leh v. Commissioner, 260 F. 2d 489 (9th Cir. 1958); Clover v. Commissioner, 143 F. 2d 570 (9th Cir. 1944); Ullman v. Commissioner, 264 F. 2d 305 (2nd Cir. 1959); Terminal Steamship Co. v. Commissioner, 34 T.C. No. 94 (1960). This Court finds nothing persuasive to the contrary in the decisions relied on by plaintiff: Hort vs. Commissioner, 313 U.S. 28 (1941); Metropolitan Building Co. v. Commissioner, 282 F. 2d 592 (9th Cir. 1960); Commissioner v. Ray, 210 F. 2d 390 (5th Cir. 1954); Commissioner v. McCue Bros. & Drummond, Inc., 210 F. 2d 752 (2nd Cir. 1954); Commissioner v. Golonsky, 200 F. 2d 72 (3rd Cir. 1952); Warren v. Commissioner, 193 F. 2d 996 (1st Cir. 1952); Anton L. Trunk, 32 T.C. 1127 (1959); Hamilton & Main, Inc., 25 T.C. 878 (1956); Inaja Land Co., Ltd., 9 T.C. 727 (1947).

However designated by the parties thereto and whatever some of the legal characteristics thereof, the transactions under consideration by essential nature are not within the strictly limited category specified by statute for capital gain treatment in the computation of income tax.

Findings of fact, conclusions of law and judgment as proposed by defendant have this date been signed by the court and forwarded to the clerk for entry.

Dated this 17th day of March, 1961.

/s/ GEO. H. BOLDT,
United States District Judge.

[Endorsed]: Filed March 20, 1961.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case having come on for trial before this Court on November 17, 1960, and the Court having heard the evidence adduced by the parties and having considered the stipulation of facts contained in the pretrial order dated October 17, 1960, and having entered a memorandum decision made a part hereof, hereby makes the following findings of fact and conclusions of law:

Findings of Fact

1. This is a civil action brought under Title 28 U.S.C., Section 1346(a)(1) for the recovery of income tax and interest assessed by the Commissioner of Internal Revenue against and paid by plaintiff to defendant under the Internal Revenue Code of the United States for the taxable calendar year 1954.

2. Plaintiff, a corporation duly organized under the laws of the State of Delaware on October 16, 1933, has maintained its principal place of business at Tacoma, Washington, from the date of incorporation up to and including the date hereof. During all of the said years it has filed its federal income tax returns with the District Director of Internal Revenue at Tacoma, Washington.

3. Plaintiff, during the year 1954 and during the years prior and subsequent thereto, has engaged in the business of operating a dry cargo steamship fleet in intercoastal trade. As a steamship operator, it is the owner of a number of vessels. During the year 1954, it owned and operated seven dry cargo Liberty type vessels, each of which was owned by plaintiff for more than six months prior to the beginning of that year, and each of which was documented under the laws of the United States, and, as such, was an American flag vessel as required by law for vessels operating in intercoastal trade.

4. Under Sections 9 and 37 of the Act of September 7, 1916, Chapter 451, 39 Stat. 728, as amended (46 U.S.C. 1958 Ed., Sections 808 and 835), the Secretary of Commerce, acting through the Maritime Administration, exercised control over the transfers of vessels documented under the laws of the United States. It was within the power of the Maritime Administration to withhold the privilege of a ship owner to transfer its vessels to a foreign registry. However, until August 16, 1954, it was its policy to decide each application for transfer of a vessel on its own merits, using no specific rigid policy. In deciding whether to permit a ship owner to transfer the vessel foreign, the Maritime Administration would consider such factors as the needs of our national defense, the life expectancy of the vessel, the need to attract private financing, the possibility of vessel replacement, the character of the vessel, the character of the transferee and other factors related to the national welfare.

5. Prior to the period beginning August 16, 1954, Weyerhaeuser operated all of its Liberty vessels in intercoastal trade. In order for each of Weyerhaeuser's vessels to engage in intercoastal trade, each such vessel was required to be registered under the American flag. Once a vessel was transferred to a foreign registry, it was disqualified from ever again engaging in intercoastal trade, and this disqualification remained permanent even if the ship was later returned to American registry. If Weyerhaeuser had ever transferred a vessel foreign, it could, therefore, never use that vessel again in intercoastal trade. As a result, it was not interested in transferring its ships to foreign registry, nor did it ever apply for a transfer foreign. When negotiating for the purchase of its Liberty ships, it gave no thought to foreign operations, nor did it attribute any value to the use of those ships under foreign registry. Instead of exercising its privilege to request transfer foreign for any or all of its seven Liberty vessels, Weyerhaeuser chose to use its Liberty vessels solely under United States registry during the entire time it owned them.

6. On August 16, 1954, the Maritime Administration changed its policy and adopted the rigid so-called "one-for-one" policy, which, in turn, was subsequently terminated approximately four months later in December, 1954. Under this temporary "one-for-one" policy, an owner of more than one Liberty vessel was permitted by the Maritime Administration to transfer one vessel foreign for each such

vessel it agreed to retain under United States registry. Where the owner of only one Liberty vessel desired to transfer it to foreign registry, approval of the transfer of registry for such vessel was granted only if the owner joined forces or "paired-up" with another owner of a Liberty vessel and the other owner agreed to retain its ship under United States registry.

7. In accordance with this temporary "one-for-one" policy, taxpayer agreed to retain four of its Liberty vessels under United States registry in order to permit the owners of four other vessels to transfer such ships to foreign registry. In return for its agreements temporarily to retain four of its seven Liberty vessels under United States registry Weyerhaeuser received, from the owners of the four vessels transferred foreign, the sum of $291,437.50. By retaining its ships under the American flag, Weyerhaeuser continued to use its Liberty vessels in the same manner as it had always done since their purchase before the "one-for-one" policy was put into effect, namely, under United States registry. There is no evidence in the record to show that Weyerhaeuser's shipping operations were in any way limited or restricted by its commitment agreements or that its business was in any way changed or altered by virtue of these agreements.

8. After the expiration of the "one-for-one" policy in December, 1954, retention agreements such as the four executed by Weyerhaeuser, were no

longer considered as binding by the Maritime Administration. After the expiration of this temporary policy, when a ship owner requested allowance to transfer foreign a vessel which had been committed to United States registry during the period of the "one-for-one" policy, it was given the same consideration by the Maritime Administration as was afforded to owners of vessels which had never been committed to United States registry during the temporary "one-for-one" policy. Owners of committed ships, such as Weyerhaeuser had the same privileges as to transfers foreign as did owners of non-committed ships, since each was treated equally and given the same consideration as to transfers foreign by the Maritime Administration.

9. Weyerhaeuser, at no time, transferred or otherwise disposed of any if its Liberty vessels during the period herein involved.

10. After the termination of the temporary "one-for-one" policy, Weyerhaeuser had the same rights with respect to the transfer foreign of its "committed" ships that it had prior to its entering into the "commitment" agreements and prior to the adoption of the "one-for-one" policy.

11. Under the "commitment" agreements, Weyerhaeuser agreed to use its ships only under United States registry until the "one-for-one" policy was terminated.

12. Under the "commitment" agreements, Weyerhaeuser agreed to forbear from requesting per-

mission of the Maritime Administration to have four of its Liberty vessels transferred to and used under foreign registry.

Conclusions of Law

1. This Court has jurisdiction of this action and the parties thereto.

2. The income tax deficiency assessed by the Commissioner of Internal Revenue and collected from the plaintiff for the taxable year 1954 was proper and no refund is due under the claim asserted in this action.

3. The presumption favoring the correctness of the Commissioner's assessment is fully supported by the facts and law material to this case.

4. The transactions involved in this action did not result in the sale or exchange of property, capital assets or property used in the plaintiff's trade or business within the meaning of Sections 1221 and 1231 of the Internal Revenue Code of 1954.

5. Plaintiff, by agreeing to retain its vessels in United States registry, thereby voluntarily restricted the use to which it could put its Liberty vessels.

6. Plaintiff received the amount of $291,437.50 in return for its agreement to forebear from applying to the Maritime Administration for permission

to have its Liberty vessels operated under foreign registry.

7. The payments received by the plaintiff for its agreements to retain its vessels in American registry constitute ordinary income within the meaning of the Internal Revenue Code.

8. The amounts received by the plaintiff under its retention agreements did not reduce the bases of the plaintiff's vessels.

9. The defendant is entitled to judgment in its favor dismissing plaintiff's complaint with prejudice and awarding defendant its costs and disbursements herein.

Dated this 17th day of March, 1961.

/s/ GEORGE H. BOLDT,
United States District Judge.

Presented by:

/s/ CHARLES H. MAGNUSON,
Attorney, Tax Div., Department of Justice.

Lodged February 14, 1961.

[Endorsed]: Filed March 20, 1961.

United States District Court, Western District of Washington, Southern Division

No. 2483

WEYERHAEUSER STEAMSHIP COMPANY,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled action having come on for trial before this Court on November 17, 1960, sitting without a jury, the plaintiff and the defendant appearing by their respective attorneys, and upon consideration of the stipulation of facts in the pretrial order, the exhibits, the briefs and oral arguments of the parties, and the Court having rendered its memorandum decision on March 20, 1961, which opinion is made a part hereof by reference, it is hereby

Ordered, Adjudged and Decreed that plaintiff is not entitled to any recovery prayed for in the complaint and notation of the judgment having been entered in the Civil Docket pursuant to Rule 58, Federal Rules of Civil Procedure, on March 20, 1961, judgment is entered for the defendant dismissing plaintiff's complaint with prejudice and with costs, if any, to be assessed against the plaintiff.

Done in Open Court this 22nd day of March, 1961.

/s/ GEORGE H. BOLDT,
United States District Judge.

Approved as to form:

/s/ RICHARD K. QUINN,
Attorney for Plaintiff.

Presented and Approved by:

/s/ CHARLES H. MAGNUSON,
Attorney, Tax Division, Department of Justice;

/s/ CHARLES W. BILLINGHURST,
Asst. United States Attorney.

Entered March 20, 1961.

[Endorsed]: Filed March 23, 1961.

[Title of District Court and Cause.]

BILL OF COSTS

Judgment having been entered in the above-entitled action on the 23rd day of March, 1961, against Weyerhaeuser Steamship Company, the clerk is requested to tax the following as costs:

Bill of Costs

Fees of the clerk: $15.00 (Disallowed).
Attorney fees: $20.00 (Allowed).
Total: $35.00 ($20.00 Allowed).

United States of America,
Western District of Washington,
Southern Division—ss.

I, Charles H. Magnuson, do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day mailed to Richard K. Quinn, of Counsel for Plaintiff, 1201 Tacoma Bldg., Tacoma, Wash., with postage fully prepaid thereon.

Please take notice that I will appear before the Clerk to tax said costs on the 28th day of March, 1961, at 9:30 a.m.

/s/ CHARLES H. MAGNUSON,
Attorney, Tax Div., Department of Justice, Attorney for Defendant.

Subscribed and sworn to before me this 27th day of March, A.D. 1961, at Tacoma, Wash.

[Seal] /s/ INEZ V. CHAPMAN,
Deputy Clerk, U. S. District Court, Western District of Washington.

On objection of Plaintiff's Counsel to $15.00 item above costs are hereby taxed in the amount of $20.00 this 28th day of March, 1961, and that amount included in the judgment.

/s/ J. EDGAR MacLEOD,
Deputy Clerk.

[Endorsed]: Filed March 27, 1961.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Weyerhaeuser Steamship Company, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 20th day of March, 1961.

Dated this 16th day of May, 1961.

/s/ DANIEL C. SMITH,

/s/ OLIVER MALM,

/s/ RICHARD K. QUINN,
Attorneys for Plaintiff.

[Endorsed]: Filed May 16, 1961.

[Title of District Court and Cause.]

COSTS BOND

Know All Men by These Presents,

That we, Weyerhaeuser Steamship Company, as principal, and United Pacific Insurance Company, as surety, are held and firmly bound unto The United States of America, in the sum of Two Hundred Fifty Dollars ($250.00), to be paid to the said United States of America, to which payment we bind ourselves, our successors and assigns, jointly and severally.

Whereas, on the 20th day of March, 1961, a judgment was entered in the above-entitled cause adverse to the plaintiff therein, and the said plaintiff has duly filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit.

Now, Therefore, the condition of this bond is that if the said Weyerhaeuser Steamship Company shall pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Court of Appeals may award if the judgment is modified, then the above obligation to be void, otherwise to remain in full force and effect.

Dated this 16th day of May, 1961.

[Seal] WEYERHAEUSER STEAMSHIP COMPANY,

By /s/ ROBERT W. BOYD,
Secretary.

[Seal] UNITED PACIFIC INSURANCE COMPANY,
Tacoma, Washington;

By /s/ EINAR N. BUGGE,
Attorney-in-Fact.

[Endorsed]: Filed May 16, 1961.

[Title of District Court and Cause.]

STIPULATION

It is stipulated and agreed by the interested parties to the above-entitled cause, by their respective counsel, that the attached retyped copy of the deposition of Walter C. Ford and exhibits therein included, taken October 28, 1960, at Washington, D. C., and filed in District Court on November 1, 1960, under District Court Clerk's document No. 8, and made a part of the record at time of trial, may now be made a part of the files and records of this cause in place of and with the same effect as the original of the deposition and exhibits aforementioned which cannot now be located.

Dated this 12th day of June, 1961.

/s/ RICHARD K. QUINN,
Counsel for Plaintiff.

/s/ DAVID J. DORSEY,
Counsel for Defendant.

ORDER

So Ordered this 14th day of June, 1961.

/s/ GEORGE H. BOLDT,
United States District Judge.

[Endorsed]: Filed June 15, 1961.

[Title of District Court and Cause.]

DEPOSITION OF WALTER C. FORD

Washington, D. C., Friday, October 28, 1960

Deposition of Walter C. Ford, called for examination by counsel for plaintiff, pursuant to notice, at Room 3059, General Accounting Office Building, 441 G Street, N.W., Washington, D. C., before Joe C. McLaughlin, a notary public in and for the District of Columbia, commencing at 3:05 p.m., when were present on behalf of the respective parties:

For the Plaintiff:

ROBERT S. HOPE, ESQ.

For the Defendant:

BURTON SCHWALB, ESQ.

Proceedings

Whereupon,

WALTER C. FORD

was called as a witness by counsel for plaintiff and, having been first duly sworn by the notary public, was examined and testified as follows:

Direct Examination

By Mr. Hope:

Q. Would you please state your name, address and official position with the Maritime Administration for the record? A. My home address?

Q. Yes, sir, please.

(Deposition of Walter C. Ford.)

A. Walter C. Ford, 148 Prince George Street, Annapolis, Maryland. Deputy Maritime Administrator.

Q. How long have you been with the Administration, sir? A. Seven years.

Q. On what date did you become Deputy Maritime Administrator? A. October 20, 1954.

Q. What was your position at the Administration prior to becoming Deputy Maritime Administrator? A. Program Planning Officer.

Q. In the course of your official duties are you familiar with the policies of the Maritime Administration with respect to the administration of sections 9, 37 and 41 of the Shipping Act of 1916 as amended?

A. Does that concern foreign transfers?

Q. Yes. I'm sorry to put it in the context of the [3*] law. It's the foreign transfer provisions of the Shipping Act of 1916. A. Yes.

Q. With respect to the administration of these foreign transfer provisions of the 1916 Act, are you familiar with the policies of the Administration which have existed since January 1, 1954, as to the transfer of Liberty-type vessels?

A. Yes.

Q. Would you please describe the policy which existed as to Liberty-type vessels prior to August 16, 1954?

A. Under the 1952 Trade-Out-and-Build policy,

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Deposition of Walter C. Ford.)

if the U. S. owner constructed a replacement vessel, he could transfer Liberties foreign.

Second, a few Liberty dry-cargo vessels in early 1954 were approved in order to protect the Maritime Administration's collateral and financial interest in the vessels or due to the extreme financial hardship of the U. S. owners.

Q. That was early in 1954? A. Right.

Q. Would you please, Admiral Ford, identify for the record a document with the letterhead of the United States Department of Commerce, Maritime Administration, dated August 25, 1954, addressed to all U. S. owners of Liberty dry-cargo ships who have applications on file with the Maritime Administration for approval to transfer said ships to foreign ownership and/or registry, signed by Mr. C. H. McGuire? A. Yes.

Q. What is this document? Are you familiar with it? [4]

A. Yes. This was a notice to the owners on the subject which you just indicated.

Q. Does this accurately state the policy which was adopted by the Administrator on August 16, 1954? A. Yes.

Q. Would you please identify who Mr. McGuire was at the time?

A. Mr. McGuire was the Chief of the Office of National Shipping Authority and Government Aid.

Q. Was the August 16, 1954, action a change in policy as to the transfer of Liberty vessels?

A. A modification, not a change.

(Deposition of Walter C. Ford.)

Q. Would you summarize briefly for the record what the substance of that was?

A. This is known as the "Liberty dry-cargo policy." It permitted the transfer to flags of Liberia, Panama or Honduras with ownership to be in corporations of Liberia, Panama or Honduras which were U. S. citizen-controlled.

It also provided that for each Liberty dry-cargo vessel approved for transfer the owner file a letter with the Maritime Administration which committed one Liberty to remain under U. S. flag.

Q. Was this known as the "one-for-one" policy in colloquial terms? A. Yes.

Q. When did this so-called "one-for-one" policy terminate?

A. December 17, 1954, was the termination date for the receipt of applications. There were still some on file which were approved in January, 1955. [5]

Q. Would you please look at this press release numbered NR 54-72, captioned "Liberty Dry Cargo Transfers Suspended, for Immediate Release, Friday, December 17, 1954." Is this press release an accurate statement of the termination of the receipt of applications for this "one for one" Liberty transfer policy? A. I believe so.

Q. Let me ask this question: Were any applications under the "one for one" policy approved after January 31, 1955? A. No.

Q. I hand you, sir, a document captioned "Documentation, Transfer or Charter of Vessels, Reprint from Federal Register, Issue of November 8, 1956."

(Deposition of Walter C. Ford.)

Can you identify this document as the action taken by the Maritime Administrator with respect to foreign transfer policies? A. Yes.

Q. Attached to that are Amendments 1, 2, 3 and 4. Would you please identify these documents as amendments to this policy? A. Yes.

(The document above referred to, together with amendments, is appended hereto and made a part of this deposition.)

Q. Subsequent to the termination of the "one for one" policy, did the Maritime Administration consider the commitments made by the owners of Liberty-type vessels to retain their vessels under U. S. registry to be binding upon such owners? [6]

A. All applications for transfer of Liberty dry-cargo ships after December 17, 1954, were considered under the provisions of sections 9 and 37 of the Shipping Act, 1916, and no distinction was made between committed and uncommitted ships.

Q. In other words, you considered these applications on a case-by-case basis?

A. That's right.

Q. I will hand you a press release dated January 25, 1960, NR 60-12, "Maritime Amends Foreign Transfer Policy," for release Monday p.m., January 25, 1960. Are you familiar with this press release?

A. Yes.

(The press release above referred to is appended hereto and made a part of this deposition.)

(Deposition of Walter C. Ford.)

Q. Would you summarize briefly the change in the policy which was effected as outlined in this press release?

A. The modification of January 25, 1960, provided that Liberty dry-cargo vessels would be considered for foreign transfer without the need for replacement on the basis of the individual merits of each application and might be approved provided a determination was made that the vessel was not needed for retention under U. S. flag or United States ownership from the standpoint of national defense, the maintenance of an adequate merchant marine, foreign policy of the United States, and national interest.

There was no limitation as to the nationality of the foreign buyer or country of registry except that the buyer and country of registry had to be acceptable to the Maritime [7] Administrator.

Conditions were prescribed for Liberty dry-cargo vessels approved for transfer under the amendment of January 25, 1960. These conditions related to ownership, availability, change in registry and trading restrictions, which conditions were substantially in accord with conditions prescribed under the earlier policy of July 5, 1952, and December 15, 1953.

Under this policy of January 25, 1960, as under all announced policies after December 17, 1954, all Liberty dry cargo vessels under U. S. flag, committed, retained and uncommitted, were considered as in the same category and eligible for transfer

(Deposition of Walter C. Ford.)

foreign in accordance with the then prevailing policy.

Q. Admiral, during the period from December 17, 1954, to January 25, 1960, did the Maritime Administration permit the transfer of any committed Liberty vessels?

A. By the foreign transfer policy of 1956, as amended, adopted originally on November 5, 1956, the Maritime Administration permitted the transfer to foreign ownership and registry of certain types of U. S.-flag, war-built vessels, including Liberty dry-cargo vessels, provided the U. S. owner agreed to construct a replacement vessel of a larger size and faster speed.

Under that program our records indicate that the Liberty dry-cargo vessels American Starling, American Eagle and American Oriole, owned by American Foreign Steamship Company, were the first "committed" Liberty dry-cargo vessels approved for transfer, namely, on December 26, 1956.

During this period all Liberties, committed [8] or uncommitted, were treated alike insofar as transfers were concerned.

Q. In the last sentence of your answer there, do you mean with respect to the new construction program, the so-called Trade-Out-and-Build program? A. Trade-Out-and-Build.

Q. During this period did the Maritime Administration permit any committed Liberty vessels to be transferred without consideration of replacement under the Trade-Out-and-Build program?

(Deposition of Walter C. Ford.)

Do you follow my question?

A. I don't believe we permitted any transfers except under the Trade-Out-and-Build program during this period.

Q. Do your records show, Admiral, when the first approval was granted after January 25, 1960, for the transfer of a committed Liberty vessel which did not involve a commitment to construct replacement vessels? A. Yes. There were five:

Valiant Hope (ex-Ocean Ulla), approval date 2/26/60.

Ocean Seaman, approval date 4/15/60.

Oceanstar, approval date 3/18/60.

Irenestar, approval date 3/18/60.

Seastar, approval date 3/18/60.

Mr. Hope: That's all I have to ask the Admiral. Thank you very much, sir. I appreciate your indulgence.

Mr. Schwalb: Just one question.

Cross-Examination

By Mr. Schwalb:

Q. Since the termination of this "one for one" policy on December 17, 1954, has a committed vessel, a vessel [9] committed during that six-month period, ever been treated differently from a non-committed vessel?

A. What six-month period?

Q. That was the August 25 to December 17 period when the "one-for-one" policy was in effect.

(Deposition of Walter C. Ford.)

A. August, what year?

Q. 1954. A. To December?

Q. During that period when vessels were committed. Have those committed vessels since that time ever been treated differently from uncommitted vessels in respect to transfer foreign?

A. I don't believe so.

Mr. Schwalb: I have no other questions.

Redirect Examination

By Mr. Hope:

Q. Admiral, with respect to your answer to that last question, do you know whether any applications after December 17, 1954, for transfer of a committed Liberty vessel were denied by the Maritime Administration?

A. I don't know of any.

Would you mind repeating that?

Mr. Hope: Would you read that back, Mr. Reporter?

(Question read by reporter.)

The Witness: No, I don't recall of any being turned down if in accordance with the policy.

Q. (By Mr. Hope): Well, does that mean that you permitted the transfer of the committed Liberties only in connection with the November 5, 1956, policy, the Trade-Out-and-Build program? [10]

A. Well, I don't believe that we permitted any transfer except in accordance with the policy during that period.

Mr. Hope: That's all I have.

Mr. Schwalb: I have no other questions.

(Whereupon, at 3:25 p.m., the taking of the deposition was concluded.)

(Signature waived.) [11]

In the District Court of the United States for the Western District of Washington, Southern Division

No. 2483

WEYERHAEUSER STEAMSHIP COMPANY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Transcript of Proceedings held in the above-entitled and numbered cause in the above-entitled court before the Honorable George H. Boldt, United States District Judge, on Thursday, November 17, 1960, at the United States Courthouse, Tacoma, Washington.

Appearances:

On behalf of the Plaintiff:

MR. RICHARD K. QUINN,

Attorney at Law.

On behalf of the Defendant:

MR. CHARLES H. MAGNUSON,
Attorney, Tax Division,
Department of Justice.

(Whereupon, at 10:30 o'clock a.m., Thursday, November 17, 1960, all counsel being present, the following proceedings were had, to wit:)

The Court: Good morning, gentlemen. Are you ready with Weyerhaeuser?

Mr. Quinn: We are, your Honor.

The Court: Go ahead.

Mr. Quinn: Your Honor, I will make just a very brief opening statement. I was not certain whether or not you had a chance to familiarize yourself with the case, but on the assumption that you have, I just wanted to hit the very highlights of the case.

The Court: I would be glad to have an opening statement. Go right ahead, Mr. Quinn.

Mr. Quinn: The question presented is whether or not the amounts received by the Weyerhaeuser Steamship Company, the plaintiff in this action, during the taxable year 1954 were, on the one hand as plaintiff contends, proceeds from the conversion of capital assets, or, as the government contends, ordinary income.

The case is a rather unusual one which arises out of the Maritime Administration's statutory authority [2*] to control the transfer of the American flag vessel to foreign registry, which contemplates

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

a sale of the vessel to a foreign corporation. The Maritime Administration prior to the taxable year 1954 had considered the statutory authority granted to it to be not one which vested absolute control in them with respect to transfer, such that there was a basic transfer right, but rather that it was vested with the authority to act in the interest of the national economy and defense with respect of the transfer. Consequently, prior to 1954, it had viewed applications for foreign transfer on a case-by-case basis, that with respect to each transfer it examined the merits of the particular application as to whether or not the particular vessel was needed in the American flag merchant marine, whether the economic effect on retaining it was such as to force the owners out of business.

There were a number of considerations. During 1954 the economic picture, as it faced the American flag owners, was such that they were unable to obtain profitable employment for the vessels. They just could not compete because of the difference in cost associated with operation of American flag vessels as opposed to costs of operation of foreign flag vessels. Consequently, to improve this picture for those owners, because many of them were being forced to sell their vessels at Marshal's sales, they were forced into [3] bankruptcy and what not, and the Maritime Administration on August 16, 1954, promulgated a new transfer program, and in essence this program permitted one foreign flag transfer if, on the other hand, an American flag owner agreed to keep his vessel in American registry. This

necessitated two owners getting together, if we are talking on the one hand of a person who owned only one vessel. His only method of obtaining approval for foreign transfer would be to tie up with an American owner.

The Court: The Senators call it "pair."

Mr. Quinn: Pair up with an American owner. Obviously if the American owner owned more than one vessel for each two owned, he could automatically get one vessel transferred for him.

Now, this program was in effect from August 16, 1954, until December 17, 1954. The reason that it was terminated was that during that period some sixty-nine vessels had been permitted to transfer to foreign flag registry under the program, and at that point the then Maritime Administrator in order to assure himself that there would still be a nucleus remaining of American flag vessels of the dry-cargo Liberty-type terminated the program.

During the program the plaintiff agreed and sold its rights to transfer foreign, which it had in the vessels [4] which it owned, sold those rights to several vessel owners. There were in this case four separate vessels involved, each in a different corporation, and as a consequence of this, they received the sum of $292,000. That is an approximation. As a result of the agreement to retain its vessels in American registry and giving up this property right to transfer because the commitments or agreements to retain were forever binding insofar as the owner was concerned, that resulted in a difference in value between the committed and uncommitted

vessels even prior to transferring to foreign registry.

The foreign ship under the foreign flag had a substantially higher market value.

As a result of the one-for-one program, when a vessel became committed, there was a difference in value then between the American vessels still available for foreign transfer and the American vessels which had sold this right and no longer were available for foreign transfer. They were bound to stay in American registry.

Now, this merely summarizes the factual highlights of what occurred. With respect to the law, and I just want to make brief mention of the position the plaintiff is taking in this case, is that it is our contention that the right to sell, transfer, or relocate property is a fundamental right with respect to ownership [5] of that property; that at no time had Congress evidenced an intent to appropriate that basic right. They merely superimposed an administrative agency to regulate whether or not you could exercise that right during certain periods of time.

Now, this right to transfer foreign, which is the basic property right about which we are talking in this case, is, in our mind, property used in the trade or business within the meaning of Code Section 1954, Code Section 1231, because it is one of the sticks associated with the ownership concept, which we will call the bundle of sticks doctrine of an asset, which is 1231 asset, being, namely, property used in the trade or business, that in transferring this

right to another vessel owner which perfects his right to transfer foreign, he needs to bring the two together in order to perfect his own right to get approval by the Maritime Administration, and transferring that, it is our contention that there is a sale of 1231 properly, namely, the right to transfer foreign which everybody had subject to regulations, which we then gave to the other vessel owner to perfect his right, and as a result of receiving the proceeds for the sale of this right, the Weyerhaeuser Steamship Company, plaintiff in this action, was a little bit perplexed as to how to proceed with reporting this [6] as a federal tax matter. It could have attempted to allocate some portion of the basis of the vessel to this right, some portion of the basis being when you buy the vessel, we will allocate some part of the cost thereof to the basic right to transfer, but because of our inability to do so, because at the time we purchased the vessel, it was an aggregate asset, we in our return, the plaintiff in its return instead treated the right as a return of capital, as is the case ordinarily with those capital transactions, where for failure of allocation of some portion of the basis to the particular property rights sold, you treat it as a return, and again the situation comes up at a later time when you dispose of the asset as a final disposition.

The plaintiff wants the Court to understand that it is always willing, just so long as this is treated as a capital gains transaction, it will always be willing to do whatever it can to attribute or allocate some portion of the basis of the asset to the right

and report the proceeds from the sale of that right over and above the amount allocated as capital gains.

This concludes my opening statement.

The Court: Thank you.

Mr. Magnuson, do you care to make your opening statement? [7]

Mr. Magnuson: May it please the Court, due to the magnitude not only of this particular case and of the amount involved in this case, but because of the principle involved in the interest of the Treasury Department and also the interest of the Attorney General, I would like to make an opening statement in that I may repeat some of the facts propounded by counsel. But if the Court permits, I will go ahead and do so.

The Court: Yes.

Mr. Magnuson: Under the Shipping Act of 1916, the Congress gave authority to the Secretary of Commerce to regulate the use of ships registered under American flag to foreign registry, and this act was implemented and promulgated through the Secretary of Commerce and through the Maritime Administration under this particular department.

In March of 1954, as shown by the exhibit in the pretrial order, there was information related to the Congress of the United States to the effect that there may have been certain controls exercised by the Maritime Commission. That was not in conformity with the Shipping Act. As a result of this hearing, a Mr. Rothchild, who represented the American Maritime Administration, presented the

views of the American Maritime Commission to the Senate. In this presentation he impressed the Senate with [8] the fact that in implementing the control over transfer of American vessels to foreign flags, that the Department of Commerce or the Maritime Administration did not in any way want to set a rigid plan of control; that their plan was one of flexibility, and in implementing this flexible plan, they would consider the national economy, the amount of maritime vessels then under American flag not only in numbers of vessels, but in total tonnage volume, and the interest of the country as far as national emergency or war emergency, and also give consideration to the individual owner as to the type of vessel that he owned, the economic situation tnat existed for him, and the interest to his concern as far as what business or what he engaged in as far as shipping.

In the same year on August 17 of that year, the Maritime Administration implemented a policy, which we will probably refer to in the course of this trial, as the one-for-one policy referred to by the counsel in his opening statement. As a result of this one-for-one policy the Maritime Administration would give favorable consideration to the transfer of an American vessel to foreign flag if there was a corresponding vessel available to be committed to American registry.

During the year 1954, the evidence will show that the plaintiff in this case was a steamship [9] company engaged in intercoastal trade, and at such time had some seven vessels that were of a dry-cargo

Liberty type, which were a wartime vessel built, I believe, some time in 1942 or '43. They were approach by other owners who wished to transfer their vessel to foreign flag, and under an agreement between the parties the plaintiff agreed to commit its vessel to American registry permitting the owner of the other vessel to apply to the Maritime Administration for approval to transfer their vessel to foreign flag. As a result of this transaction the plaintiff received an amount of money. It is this amount of money that is in issue in this case.

Now, it is the plaintiff's position that this was a sale—that it was a sale of property used in trade or business and that in addition, the amount received was a reduction in the basis of their vessels. The basis under the Code means cost, and if I might illustrate in terms of money, the cost of an item is naturally the amount of money expended for a particular piece of property. For example, if we were to use the figure $300,000 as the paid price for one of the vessels in this case, that would be the initial cost. If it were used for a number of years, the owner in all probability would make certain improvements and expenditures as to that vessel. Improvements as distinguished from repairs would also be [10] added to cost. So if we assume that during the period that they had the vessel that they put improvements of, say, another hundred thousand dollars, the cost for tax purposes would be $400,000.

Now, in addition to that, the cost for tax purposes, if they were to sell the vessel and determine

the gain thereon, their cost would be cost less depreciation taken over the years that that vessel was put into use. Assuming the fact that they depreciated the vessel for, let us say, a hundred thousand dollars for the period of use, their cost basis would then be $300,000 again. I hope I got the right figures there.

The Court: I followed you. I get the idea.

Mr. Magnuson: In this case they wish to treat the amount received not as a gain but an additional reduction in the basis of that property. In other words, deduct or subtract the amount received from their tax basis for income tax purposes, which would be a deduction of the amount received from the figure that I have mentioned, $300,000. Thereafter, when and if they do sell the vessel, the amount received above the basis would be treated as a gain from the sale or exchange of a piece of property used in the trade or business and treated as a capital asset under the Code.

The position taken by the defense in this case is that the treatment by the taxpayer that this is [11] a reduction in the basis is not supported by law nor the facts in the case, and in addition that there was no sale of property as property was used in the Code and under the legal decisions used in trade or business and in fact that the transaction did not result in a sale.

In addition, the plaintiff's position is that the amount received is in the nature of a compensatory reward, and in that respect it should be treated within the Section 61 of the Code as an income item

and as an income item should be treated for income tax purposes as the receipt of ordinary income.

Thank you, your Honor.

The Court: Thank you. Go ahead.

Mr. Quinn: At this time, your Honor, I want to point out one correction in the pretrial order, which appears at Page 4, Line 26, under the column "Vessel," which refers to the vessels of plaintiff in respect of which the amounts were received, we had the Ocean Skipper as the vessel involved. That is a misstatement. The Ocean Skipper is the vessel transferred foreign. The George S. Long is the vessel of plaintiff's which was committed.

The Court: I will strike the word "Ocean Skipper" and put in the words "George S. Long." Is that agreeable? [12]

Mr. Magnuson: Yes, your Honor.

The Court: I am writing that change in the margin, and I will initial it to indicate that it is my work. The pretrial order has been amended as suggested.

Mr. Quinn: In addition, at this time, before calling my first witness, I would like to introduce and offer in evidence the exhibits which are attached to the pretrial order on file in this case.

The Court: Is there any objection to any of them?

Mr. Magnuson: If it please the Court, I have just one objection insofar as the exhibits are used to support opinion evidence. However, pursuant to agreement between counsel, I will not object to hearsay nor the fact that they are the individuals

who made the statements with reference to Exhibits 7 and 8, but insofar as it is used by the plaintiff, if it is to be used in that way as opinion evidence, I so object.

The Court: If I understand the point of your remark, it is that as to Exhibits 7 and 8 you have no objection to their being admitted insofar as the factual data stated therein is concerned, but you do object with reference to any conclusions or opinions stated therein?

Mr. Magnuson: I believe Exhibit 9 would also fall in that category. [13]

The Court: 7, 8 and 9. Then in effect what you say is that 7, 8 and 9 may be admitted to the effect that these persons, if called upon, would testify to the factual data stated in their statements, but that you object to any opinions or conclusions drawn therefrom, is that correct?

Mr. Magnuson: Yes, your Honor.

The Court: Do you accept that?

Mr. Quinn: I accept that.

The Court: Exhibits 1 to 9, inclusive, offered by plaintiff are now admitted in evidence with the limitation as to 7, 8 and 9 just indicated.

(Thereupon, Plaintiff's Exhibits 1 to 9, inclusive, for identification were admitted in evidence.)

Mr. Quinn: I will now call my first witness, Mr. Connoy.

JOHN J. CONNOY

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: My name is John J. Connoy, [14] C-o-n-n-o-y.

Direct Examination

By Mr. Quinn:

Q. Mr. Connoy, would you state your address, please, your home address?

A. My home address is 1601 Arroyo Avenue, San Carlos, California.

Q. What is your occupation?

A. I am assistant to the president of the Weyerhaeuser Steamship Company employed in San Francisco.

Q. And how long have you been so employed?

A. I have been employed by the Weyerhaeuser Steamship Company since 1937, and in the present capacity since 1957.

Q. What was your capacity with respect to the year 1954?

A. At that time I was assistant to the executive vice-president of the company, and at that time the president of the steamship company was not active in the day-to-day conduct of the business, and so, in effect, I was in the same position as I do now.

Q. Could you give us just a brief summary of the functions you performed in 1954 in connection

(Testimony of John J. Connoy.)

with your employment; that is, just as brief as possible describing your duties in a broad sense?

A. Well, my principal areas of responsibility were in the solicitation of westbound cargo, insurance matters, in [15] chartering activities, and such other matters as the vice-president would direct.

Q. Have you familiarity in conjunction with your duties with foreign transfer of American flag vessels? A. Yes, I have had experience.

Q. Can you state this experience?

A. Yes. In the years 1946 and 1947 shortly after the termination of the war, the Weyerhaeuser Steamship Company had four vessels remaining of its present war fleet of eight ships. Those vessels had been used, of course, under order of the War Shipping Administration during the war and were returned to us in rather poor condition because of the abuse they had to take during the war. The cost of putting those ships back into class, that is, in first-class operating condition, was such that we did not feel we could economically operate them. So the decision was made to dispose of the vessels. At that time the only market for those vessels was the foreign market. Those four ships were sold to foreign buyers and with a condition of the sale that the registry of the vessels would be transferred to foreign countries, and the vessels would sail under foreign flags, and as a part of my duties then, I handled the negotiations with the purchasers, the preparation or assisted in the preparation of the documents, and also I spent some time [16] in

(Testimony of John J. Connoy.)

Washington handling the details of arranging for the transfer, the necessary Maritime Administration approval of the transfer to foreign flag.

Q. Then you do have personal knowledge with respect to the foreign Liberty-type vessels market and mechanics of transferring such vessels to foreign ownership or registry?

A. If I may clarify your question, I just want to clarify that the ships that we sold in 1946 were not Liberty ships. Those were World War One vintage ships. But since then I have handled transactions with Liberty ships in the purchase of our present fleet and have kept familiar with ship values in the intervening years, and I have had experience in the transfer of ships to foreign registry.

Q. Will you describe for the Court briefly the nature of the business operations of the plaintiff in this action, Weyerhaeuser Steamship Company?

A. The Weyerhaeuser Steamship Company is a common carrier certificated by the Interstate Commerce Commission for operation in the intercoastal trade of the United States. In 1954 the company owned and operated seven Liberty-type dry-cargo freighters. The employment of the vessels is in transportation of lumber from the Pacific Northwest to the Atlantic Coast of the United [17] States in the range from Port Everglades, Florida, to Boston, Massachusetts.

For the return trip back to the Pacific Coast general cargo of all types and nature is solicited and loaded at the ports of Philadelphia and Balti-

(Testimony of John J. Connoy.)

more for discharge at the ports of Los Angeles, San Francisco and Seattle, and it is one hundred per cent domestic operation.

Now, in addition to the operation of our own vessels, the company has from time to time supplemented its eastbound service, chartered vessels from other people to carry lumber to the East Coast.

Q. As an American intercoastal steamship operator are there governmental restrictions, and I am referring now to the United States Government, as such through its various agencies, are there governmental restrictions placed upon the American intercoastal steamship operators with respect of the registry of vessels?

A. There certainly are. A vessel to qualify for operation in the intercoastal trade must first have been built in an American shipyard, and, of course, must fly the American flag. Ownership of that vessel must consist of at least 75 per cent of American citizens. A further restriction is that if a vessel, which has once qualified for operation in the domestic trade, is transferred to [18] a foreign register and then subsequently retransfers back to American flag, that vessel may never again be allowed to operate in the coastwise trade. The rights which it originally had have been destroyed by the transfer to foreign flag.

Q. Well, then, in connection with the Weyerhaeuser Steamship Company's operation in domestic trade, it was necessary to have available to it vessels which were qualified for such trade and as

(Testimony of John J. Connoy.)

such, from your testimony, were American flag vessels, is that true? A. That is correct.

Q. Now, you mentioned foreign transfer, and can you describe from your knowledge the—what "foreign transfer" means? That is, what does it involve and how is it effected under the Maritime Administration or other governmental agencies control with respect to those transfers?

A. Well, the first requirement, of course, has always been approval of the federal Maritime Administration and its predecessor agencies.

Secondly, in every case that I have had any knowledge of, the purchaser or the person who will operate the vessel under foreign flag has used a foreign corporation and has made application to the country of the flag under which it plans to operate for permission to [19] register the vessel in that country and with the approval of the Maritime Administration, the American registry of the vessel is surrendered and the new flag country will issue documents to cover the vessel.

Q. In other words, what is contemplated is a sale of the vessel? A. That is correct.

Q. To a foreign corporation, is that correct?

A. That is correct. That has been true in every case that I have known of.

Q. Now, with respect to the taxable year 1954——

The Court: Excuse me just a moment. I want to be sure I understood what you said, Mr. Connoy. Correct me if I am wrong. You say that under ex-

(Testimony of John J. Connoy.)

isting rules and the practice of the Maritime Commission, the United States Maritime Commission, that once a ship in domestic registry, and by "domestic registry" I mean American registry, be transferred to foreign registry, that ship may not thereafter be returned to domestic coastal trade and registry?

The Witness: No,

The Court: State it again so that I have it clear what you said.

The Witness: We have two situations with [20] American flag ships. In the domestic trade of the United States, which means the transportation of commodities or passengers between two states—two states of the United States, there are imposed further restrictions than are imposed upon American flag ships that operate from the United States in foreign commerce. If a vessel, which has once qualified under the full restrictions applying to domestic operations, and I may add that the common expression in the trade for a fully qualified vessel is that it has "coastwise rights," if a vessel with coastwise rights is transferred to a foreign flag, it at that time loses forever its right to engage in coastwise trade again.

Now, that vessel could be retransferred back to the American flag and engage in foreign commerce from the Port of Seattle to the Port of Yokohama under the American flag, but it could never again carry a pound of cargo from the Port of Seattle to the Port of San Francisco.

(Testimony of John J. Connoy.)

The Court: All right. That clarifies it. Go ahead.

Q. (By Mr. Quinn): You have mentioned——

A. I might add, your Honor, if I may, that that is a federal statute, not a ruling of the Maritime Administration. [21]

The Court: All right. Go ahead.

Q. (By Mr. Quinn): Now, with respect to the taxable year 1954, the year in issue in this case, and more specifically with respect to the period of August 16 through December 17 of that year, are you familiar with the then existing dry-cargo Liberty-type vessel transfer program as announced by the Maritime Administration? A. I am.

Q. Will you describe that program for the Court?

A. Well, the program, which, again, in the trade was known as the "one-for-one program," was announced by federal Maritime Administrator Rothchild on, I believe, August 16. Under this program——

The Court: What year?

A. 1954. Under this program owners of American flag Liberty vessels would be allowed to transfer one vessel to foreign registry for each vessel that they paired up with it and agreed to retain under American registry. That program—there were at that time some owners who owned only one vessel, and in order to provide for those owners, Administrator Rothchild, I believe, on August 25, 1954, stated that those owners should find someone else who owned one or more American flag Liberty ves-

(Testimony of John J. Connoy.)

sels and have the second owner agree to pair up one of his ships, and that then the first vessel would be allowed [22] to transfer foreign.

Q. (By Mr. Quinn): Can you describe how the Weyerhaeuser Steamship Company first became interested following the date that this program was announced in retaining its vessels—any of its vessels in American registry in connection with this program?

A. Well, as a part of my chartering activities I had for some years been in almost daily contact with Mr. Burton Kellogg, a ship and chartering broker of New York City, and in almost every case of the many charters that we arranged, they were arranged for through Mr. Kellogg.

In our almost daily conversations Mr. Kellogg would pass on to me any bits of information that he picked up about the ships' sale, market, charter market rates, and I believe that it was Mr. Kellogg that first brought to our attention that out of this pairing of two separately owned vessels, a market was beginning to develop in the exchange of the agreements of retention, and—if I may deviate for a moment, in 1954 the vessels of the Weyerhaeuser Steamship Company were ten years old. They were at the midpoint in their then believed to be economic life. One of our major concerns was at that time how we were going to replace those vessels at some time ten years away. Based on our previous experience with our first fleet, the [23] only logical market for the disposal of used Amer-

(Testimony of John J. Connoy.)

ican shipping was the foreign market, and we did not take any great interest in its market in letters of retention or agreement to retain because by committing our vessels to remain under American registry, we were in effect closing a door on what might be our only market for the disposal of those vessels when the time came that we had to replace them for our own trade.

However, as weeks went on, the market for the agreements reached a point where it appeared to us that the compensation for an agreement to retain was about equivalent to the penalty that we would take by agreeing to retain our vessels under the American flag, and when I say the penalty, I mean the difference that then existed between the **value of an American—**of an uncommitted American flag Liberty ship and a committed American flag Liberty ship. It was at that point that we negotiated for on the agreements that we entered into.

Q. Did you then consider that at the point at which the offers or retentions of agreements had reached a certain level, that the amount which would be received by the retention agreement was compensation for the loss of the right to ultimately dispose of the vessel on the foreign market? [24]

Mr. Magnuson: Objection, leading.

The Court: Sustained.

Q. (By Mr. Quinn): Can you tell us about the various offers you received for the retention agreements?

A. Yes. I will have to speak only from memory,

(Testimony of John J. Connoy.)

but shortly after—starting at about the first of September we received——

The Court: What year?

The Witness: 1954.

The Court: It is plain, but it reads better in the record when you state it.

A. (Continuing): We received several—in fact many offers, some of them came through Mr. Kellogg who had always acted as our broker, and the other came direct from other brokers, and who were then referred to Mr. Kellogg, and in one or two cases we had calls and inquiries from owners direct. At one period, I will say, we were almost hounded with offers. In fact, we had one offer—several offers from one individual who wanted to make a flat package deal for the retention of our entire fleet.

Q. (By Mr. Quinn): For how long a period did you consider the agreements of retention to be binding upon the Weyerhaeuser Steamship Company with respect of the vessels that it agreed to retain? [25]

A. It was our understanding at the time there was no time limit on it. They ran on indefinitely. So that we would be in effect binding ourselves for an unknown period.

Q. And Mr. Kellogg represented Weyerhaeuser Steamship Company with respect to the negotiations of these agreements of retention subject, of course, to the approval of Weyerhaeuser Steamship Company as principal?

A. That is correct.

(Testimony of John J. Connoy.)

Q. Can you tell us why the Weyerhaeuser Steamship Company did not execute agreements relating to all of its vessels?

A. Well, as I have said earlier, we anticipated that the only market for the disposal of our vessels ultimately would be the foreign market. We did not want to completely close the door of that market for all of our ships. That was our principal reason.

Q. Mr. Connoy, in connection with retention of all of Weyerhaeuser Steamship Company's vessels in American registry, did you have an offer with respect of the entire fleet?

A. Yes, sir, we did.

Q. Can you tell us a little bit about that offer?

A. Only that it was an offer for the fleet, a package deal. I forget what the opening offer was, but I do know that [26] at one time we were at a firm offer of $500,000 for letters of retention on the entire fleet, but it was not considered.

Mr. Quinn: I have no further questions.

The Court: Cross-examine, please.

Cross-Examination

By Mr. Magnuson:

Q. Mr. Connoy, you recall that we had a discussion yesterday morning at the Winthrop Hotel here in Tacoma? A. Yes, sir.

Q. And, as I understand it, as a result of that conference it is your—you recollect that the payees solicited the Weyerhaeuser Steamship Company in

(Testimony of John J. Connoy.)

connection with these retention agreements, is that correct? A. That is absolutely correct.

Q. And as a result of this solicitation to the Weyerhaeuser Company, those individuals or owners——

Mr. Quinn: Pardon me. I just want to point out I think there is an error in the record. Mr. Magnuson stated it was the payees who solicited——

The Court: I noticed that term. What do you mean by that?

Mr. Quinn: It would be the payor, the [27] payee being Weyerhaeuser Steamship Company.

Mr. Magnuson: Excuse me. It was the payor, if we wish to use that term.

The Court: In other words, what you mean is the person who paid Weyerhaeuser for this retention agreement, that is what you mean. Is that what you mean?

Mr. Magnuson: The party that wanted to get it.

The Court: The party that wanted to sell to a foreign registry.

Mr. Magnuson: Yes.

The Court: I noted that word and I was going to ask if you would explain what you meant.

Mr. Magnuson: Excuse me, your Honor.

The Court: Go ahead.

Q. (By Mr. Magnuson): And those individuals would then refer to your broker, Mr. Kellogg in New York City, who then negotiated with the brokers or owners of the other vessels as to the commitments that were finally entered into?

(Testimony of John J. Connoy.)

A. Yes, except that some of the inquiry came through Mr. Kellogg. They did not, all of the inquiries, come to us direct.

Q. So either direct or indirect, through Mr. Kellogg? [28] A. That is correct.

Q. And that it was Mr. Kellogg who finally drafted the agreements that the Weyerhaeuser Company—under which the Weyerhaeuser Steamship Company agreed to retain its vessels under American flag?

A. I do not know whether that is a correct statement or not.

Q. I thought that is what you said yesterday morning.

A. That Mr. Kellogg, himself, drafted those agreements——

The Court: Well, by him, or under his direction, or his offer.

The Witness: That came to us through him.

Q. (By Mr. Magnuson): Through him?

A. But who actually drafted them I don't know.

Q. And they were approved by your office in San Francisco? A. That is correct.

Q. And did your office in San Francisco request any advice from any other parties with reference to those particular transactions?

A. Well, now are you talking about the documents?

Q. The document, itself, the form of the substance of the document, itself.

A. Yes. I recall the first one was submitted to

(Testimony of John J. Connoy.)

the legal department here in Tacoma for their review and approval of the form. [29]

Q. And after having had their review and approval, it was then returned to Mr. Kellogg for final signing?

A. I believe, to be technically correct, that Mr. Kellogg was advised by phone that they had been approved, and they were then signed in New York by our vice-president in New York, signed for Weyerhaeuser.

Q. And you, yourself, were not a party to the final signing, it was your representative in New York, is that correct? A. That is correct.

Q. To the best of your knowledge, the agreements, themselves, represented the final agreement entered into by the parties?

A. Yes, to the best of my knowledge.

Q. And it represents, to the best of your knowledge, the rights and duties of each of the parties as to the transaction? A. Yes.

Q. Now, as I understand it, Mr. Connoy, the Weyerhaeuser Steamship Company is a company engaged in intercoastal trade, is that correct?

A. That is correct.

Q. And as engaged in intercoastal trade, it is required by law to retain its vessels under American flag? A. Right. [30]

Mr. Quinn: Objection.

The Court: Overruled. He gave a matter of law on the same point, and I must allow it. It is un-

(Testimony of John J. Connoy.)

common for a layman to give opinions on law, but it was permitted here, so I must permit cross.

Go ahead. In fact, I am anxious to find out the basis of his information. Go ahead.

Mr. Quinn: Withdraw the objection.

The Court: Ordinarily we don't allow laymen to give opinions on matters of law, Mr. Connoy. Don't be disturbed.

The Witness: This is my first time in the witness chair.

The Court: There is nothing personal in the remarks.

Q. (By Mr. Magnuson): Insofar as the Weyerhaeuser Steamship Company was concerned, it was not interested in using its ships under foreign flag?

A. Some consideration was given to a transfer of one or two vessels, some studies were made, but no action was taken on it, and it is true that we were not interested in operating under a foreign flag.

Q. Now, these vessels, as I recall, were acquired by the Weyerhaeuser Company—the vessels I am referring to, the seven that were owned by the Weyerhaeuser Company in [31] 1954—were acquired some time in 1953, is that correct?

A. Oh, no.

Q. Excuse me. When were they acquired?

A. Four of the vessels were purchased in 1947, two of them in 1948, and the seventh in 1951.

Q. Well, then at the time of acquisition the use of those vessels under foreign flag was not of con-

(Testimony of John J. Connoy.)

cern to the Weyerhaeuser Steamship Company. Would that be correct?

A. If I may, if I understand your question——

Q. If you don't, ask me to ask another one or say you don't understand. I will try to rephrase it.

A. I don't understand it.

Mr. Quinn: Immaterial.

The Witness: Could I rephrase it?

Mr. Magnuson: You rephrase it to suit yourself.

Mr. Quinn: I would like to have the Reporter read back the question.

> (Whereupon, the Reporter read back as follows: "Well, then at the time of acquisition the use of those vessels under foreign flag was not of concern to the Weyerhaeuser Steamship Company. Would that be correct?")

Mr. Quinn: I object to that as immaterial.

The Court: It may be, but I will let him answer in any case and decide that later. [32]

A. If I understand that to mean that at the time we purchased these vessels in 1947, and 1948, and 1951, that at each of those times we did not have in mind foreign operation at the time we bought the vessels, that is correct. There was no thought of foreign operation.

Q. (By Mr. Magnuson): By the Weyerhaeuser Steamship Company? A. That is correct.

Q. And that consideration was not used in the purchase of those vessels?

(Testimony of John J. Connoy.)

A. That is correct.

Q. Would it be fair to say, however, though, that consideration was given to the use of chartering these vessels to other owners?

A. That occurred in a few isolated instances when they were surplus for a period to the needs of our trade, and were then. I don't believe that at any time we had more than one ship at a time out on time charter for short periods to other American flag operators.

Q. Well—excuse me.

The Court: I think I didn't quite get the question. As I understand it, that did occur on this one occasion, perhaps some other, but the question was, did you contemplate that when you acquired it? Did you contemplate chartering out [33] for the use of others at the time the ships were acquired?

The Witness: Again, may I say that we did not buy the vessels with the thought of chartering them out to others as one of the reasons for buying them.

Q. (By Mr. Magnuson): It was contemplated you may charter out to other owners?

A. That is part of a normal operation of the business.

Q. That is right. That is all I wanted to find out, Mr. Connoy.

And in chartering out, it may be chartered out to an owner who would use it under foreign flag?

A. No, sir.

Q. Excuse me—use it in other than intercoastal trade? A. That is correct.

(Testimony of John J. Connoy.)

Q. And may use it in foreign trade?

A. Yes, but under the American flag.

Q. But under the American flag?

A. Correct.

Q. But as I understand it, no contemplated, no value was given to this use of the vessel?

The Court: No value given—what do you mean by that?

Q. (By Mr. Magnuson): At the time they were purchased, in [34] negotiating for the purchase, or in the acquisition of that vessel, did you or did you not give a value to this use that may be contemplated for that particular vessel?

A. I don't think it had any bearing on it.

Q. In other words, you didn't consider giving a value to that particular use? A. No.

Q. Now, you made reference to the fact that once a vessel had obtained a foreign flag it could never again return to American registry, is that correct? A. No, sir, I did not say that.

Q. Well, maybe I misinterpreted what you said.

The Court: He said it could return to American registry, but it could not thereafter engage in intercoastal trade.

The Witness: Yes.

The Court: It could be returned to American registry, but would be required to, by virtue of a federal statute that he didn't cite, but which I have no doubt is citable, would be permitted to engage in foreign trade but not in domestic. That is the way I understood it.

(Testimony of John J. Connoy.)

The Witness: That is correct, sir.

Q. (By Mr. Magnuson): At the time that the agreements were [35] entered into, was any consideration given, to your knowledge, by the Weyerhaeuser Steamship Company to salvage value of the particular vessel under the agreement?

A. Well, that is something that I have no knowledge of.

Q. You would not know?

A. No. It would not be——

Q. Was any consideration given to depreciation taken on that particular vessel?

A. That I would not know.

Q. You would not know that? A. No.

Q. Had the Weyerhaeuser Steamship Company, with reference to the vessels under the agreement ever applied to have those vessels transferred to foreign registry? A. No, sir.

Q. They had not? A. No, sir.

Q. Then it would be fair to say that the Maritime Administration had never turned down a request by the Weyerhaeuser Steamship Company to transfer those vessels to foreign flags?

A. We have never been asked to.

Q. And you found out they never would have to turn down such a request? [36]

A. We never had the opportunity.

Q. Now with reference to the contracts or the agreements involved, to your knowledge there is no restriction as to the sale of the vessel contained in the agreement entered into between the parties?

(Testimony of John J. Connoy.)

A. I don't understand.

Q. Well, I will ask it this way: Is there a restriction as to the sale of the vessel, itself?

The Court: The laid-up vessels?

Mr. Magnuson: The one committed to American registry.

The Court: Yes.

Mr. Magnuson: The ship owned by the Weyerhaeuser Steamship Company.

The Court: Of course, the document, itself, would be the best evidence of that, but I presume that is your point.

Mr. Quinn: Yes, your Honor.

The Court: But if it is prefatory to something you want to inquire about, the witness' knowledge of that could be brought out. But otherwise, the document will speak for itself.

Mr. Magnuson: I believe that is true, your Honor. I would just be mindful of the fact they had gone into the agreement, and I just wanted to [37] clarify for the record that this point was not set forth.

The Court: It is a nice point, but still it is—that will be covered by the agreement, itself, but sometimes the knowledge of a witness as to the contents of the document may be brought out as prefatory to some other inquiry or something of the kind. If you merely mean it for the fact of the matter, I must derive that from the document, itself.

Q. (By Mr. Magnuson): When this one-for-one policy was discontinued in December 17 of 1954,

(Testimony of John J. Connoy.)

did the Steamship Company treat this continuance as a gain to the Steamship Company, to your knowledge?

A. I don't believe it did, not to my knowledge.

The Court: When did you say that policy was discontinued?

Mr. Magnuson: December 17, 1954. I believe that is in the pretrial order.

The Court: Yes, it probably is, and it just skipped my attention.

Mr. Magnuson: No further questions.

The Court: Any redirect, Mr. Quinn?

Mr. Quinn: Just one point, your Honor.

The Court: Yes. [38]

Redirect Examination

By Mr. Quinn:

Q. Mr. Connoy, you have testified in response to Mr. Magnuson's questions that at the time the plaintiff executed its retention agreements it was not interested in foreign flag transfer with respect to its own vessels, that is, as to operation?

A. That is correct.

Q. However, did Weyerhaeuser Steamship Company regard the commitment as an important thing with respect to its vessels? In other words, it was interested in whether or not they were committed or uncommitted?

I don't mean to lead you, but I mean, wasn't this

(Testimony of John J. Connoy.)

a consideration with respect to the agreements, and can you explain why it was?

A. I am sorry, but——

The Court: He means, at the time this matter was negotiated, was the matter of whether or not Weyerhaeuser would or would not lay up its vessels or enter into the agreement a matter of substantial concern, and to what effect?

The Witness: Yes, it was, because——

The Court: That is your question?

Mr. Quinn: That is my question.

A. (Continuing): It meant, as I said earlier, agreeing to [39] retain under American flag registry for a period that was certainly indefinite and would have prevented our disposing of the vessels in the foreign market at some later date had we so desired.

The Court: Is that all?

Mr. Quinn: That is all, your Honor.

(Witness excused.)

The Court: Thank you, Mr. Connoy. You are excused and may leave.

Mr. Quinn: I would like to call Mr. Burton Kellogg.

BURTON W. KELLOGG

called as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please, and spell your last name.

The Witness: Burton W. Kellogg, K-e-l-l-o-g-g.

Direct Examination

By Mr. Quinn:

Q. Mr. Kellogg, will you give us your home address?

A. 215 East Dudley Avenue, Westfield, New Jersey.

Q. And your office address? [40]

A. 19 Rector Street, New York City.

Q. And what is your occupation?

A. I am a ship and chartering broker.

Q. Can you give us a brief summary of your experience with respect to the shipping industry, particularly as related to your higher level educational background, your years of experience, the companies for whom you have worked, your knowledge of the shipping industry as such, and other related matters which you deem of importance in connection with your occupation?

A. I am a graduate of Colgate University in 1934. I served the firm of Emory Sexton and Company in January of 1939, and became and was instructed in chartering and ship sales matters, and began to negotiate as a broker in these matters.

(Testimony of Burton W. Kellogg.)

Now, a ship broker is one who tries to make a meeting of minds between two principals, sometimes with another broker in between. It is very much like a real estate broker, except we are dealing in a moving commodity and we are moving commodities.

In 1943, about April, I believe, I joined Perry Navigation Company, who was an operator of Liberty-type vessels during the war, and I served originally as in charge of their labor agreements with the crew and in the payroll end of the crew. By the time they [41] liquidated in 19—at the end of 1947 or early 1948, I was manager of the marine department. In July of 1948, I rejoined Emory Sexton and Company, Inc., which had been incorporated about 1946, April of 1946. I was a stockholder in the firm from the incorporation and vice-president, but was not active in it again until 1948. In 1954 I became president of the firm, and I am acting in that capacity up to now.

Q. You refer—just for clarification—you have referred to Emory Sexton and Company. Would you identify for the Court the nature of the business?

A. Emory Sexton and Company has been mainly dealing in ship brokerage and chartering activity and some agency work. Mr. Sexton established the firm in 1914. We are considered one of the smaller brokers, but one of the leading ones in the American field as far as chartering American flag and selling American flag.

(Testimony of Burton W. Kellogg.)

Q. Can you describe for us the nature of the work that you perform in conjunction with your duties? Put it from the period 1952 to date. Describe briefly what a ship charter or broker does.

A. Well, essentially we have to be up to date on the market conditions on values of ships, charter rates, and of course, it is our job to find for an owner a cargo if it is in chartering, and vice versa, for a shipper to [42] find a ship, and then negotiate between the two parties until there is a meeting of the mind and understanding and the contract is concluded.

In the ship sales it is very much the same, except you are dealing in a little more valuable property and you have more difficulty in working out the contract.

Q. In connection, then, with your duties as a ship charter and broker, do you have familiarity with the Maritime Administration's transfer programs respecting dry-cargo vessels?

A. We have to keep posted and up to date and be acquainted with those things as they would affect what we are able to do as brokers, and in order to conduct our business we have to follow them.

Q. Now, referring specifically to dry-cargo Liberty-type vessels, can you tell us the Maritime Administration's vessel transfer program as it existed prior to August 16, 1954? I mean, now, immediately preceding that date.

A. Well, immediately preceding that date there were two general programs that the Maritime Ad-

(Testimony of Burton W. Kellogg.)

ministration had. One was where an owner would agree to build newer type, larger type, modern type vessels in an American shipyard, the Maritime Commission would allow transfer of flag of a Liberty-type vessel. In some cases, depending on the size of the vessel to be built, there might be two [43] or even three Liberties permitted transferred for the building of these large tankers that were built at that time.

In the second program, it was strictly on the individual case and its merits and how it would affect the economy and the defense of the country.

Q. Referring to this latter, can you describe just very quickly just the mechanics of a vessel application for transfer prior to this August 16, 1954? How would you go about that?

A. There could be two ways, two types of transaction: One where an owner might be transferring it without a sale to another party, but through a corporation that he had interest in, foreign, and the other one an outright sale to a completely different group. Both mechanics would be handled the same. They would apply to the Maritime Commission, stating all the facts, the country that it is to go to, the persons involved, and then the Maritime Commission would look at these facts, would check with the State Department and check with the Navy Department as to whether they had any objection to the transfer, either because of who the people were or whether it would be detrimental to the defense

(Testimony of Burton W. Kellogg.)

of the United States to let a flag go out of American registry.

Q. Now, on August 16, 1954, the Maritime Administration [44] promulgated a new dry-cargo Liberty-type vessel program. Are you familiar with that program? A. Yes, I am.

Q. Can you describe the program and how it operated?

A. The program that came out originally described how an owner could pair his vessels together. If he had two or had four, half of his fleet could be transferred to either Honduran, Panamanian, or Liberian flag, and there were other detailed restrictions on this.

The Court: Do you mean by agreement to retain the others in lay-up status?

The Witness: Not in a lay-up, but permitted to stay in operation under American flag.

The Court: Yes.

The Witness: American registry. Then the question came up, what would happen to the owner with one ship or the owner with an odd number of ships, and it was later in the month, I believe, that they ruled that they could pair with other owners, and that the agreement between the two owners was not necessarily—what arrangements were made as to who transferred and who retained was of no particular interest to the Maritime Administration.

Q. (By Mr. Quinn): So, so long as there was one vessel [45] retained under American registry,

(Testimony of Burton W. Kellogg.)

the Maritime Administration would approve the vessel for transfer to foreign registry?

Mr. Magnuson: I object to the leading question, and I think, in addition to that, to be very clear in my point here——

The Court: Well, let counsel reframe it.

Mr. Magnuson: ——there is a conclusion in that question.

The Court: It may well be. Let counsel reframe it.

Mr. Quinn: I withdraw the question, your Honor.

Q. (By Mr. Quinn): How long was this program to which we have referred as the one-for-one program, how long was the program in effect?

A. It was in effect until, I believe it was December, middle of December, I can't recall the exact date, 16th, 17th, somewhere——

The Court: That same year?

The Witness: Same year, 1954.

The Court: August to December is the period in which it was in effect?

The Witness: Yes.

The Court: All right. [46]

Q. (By Mr. Quinn): Do you have knowledge as to how many vessels were transferred to foreign registry in connection with this program?

A. By acknowledgment of the Maritime Commission, there were sixty-nine vessels so transferred.

Q. What were the consequences of this transfer program with respect to the economic picture for

(Testimony of Burton W. Kellogg.)

steamship operators of either foreign, American, or in any manner you want to describe it?

Mr. Magnuson: I don't really fully understand the materiality.

The Court: It may well be, but I will take the proof and we will consider whether it is material later.

Mr. Magnuson: I object on that basis.

The Court: Yes, of course. Your objection is noted and quite properly so. I am not being critical of your making it. I merely say I will consider its materiality later, but I will let the proof go in.

The Witness: I don't quite understand.

The Court: What were the economic or financial results of this policy?

A. Well, the result created immediately a value for the rights to be paired with other owners. That was the [47] first effect.

The general effect for the American owner was that by transferring this number of vessels into foreign flag, that left fewer vesels to compete in the American market for business and tended to strengthen the charter market on American ships. Their support only came from these aid programs, really, as they couldn't normally compete with foreign flag vessels in the general market.

For the owners who transferred and had to maintain 51 per cent American under the regulations, this gave them some relief, as under the foreign market they had a chance to have a little better

(Testimony of Burton W. Kellogg.)

margin of profit than they would under American-flag conditions that existed before this program.

Q. (By Mr. Quinn): Now, you referred to two things in your answer which I believe bear some explanation for purposes of clarification, and you mentioned something about aid programs.

To what are you referring when you talk of an aid program?

A. Well, our aid programs are prettty well publicized. They have been under various names. Originally, the Marshall Plan was the aid program, and they have adopted a regular—Congress passed an act that 50 per cent of the aid programs be carried in American bottoms. The [48] 480 program is under the same condition. This is now operating under another agency name, I.C.A., and I have trouble remembering the exact name of what I.C.A. stands for at this minute.

Q. I wasn't actually asking that you give us the varied programs. You just mentioned it as "aid."

A. It is aid to foreign governments that we wish to support. It is a world political reason that I think all of us are acquainted with.

Q. And the aid programs with respect to carriage of goods, were they available to American operators? A. Yes.

Q. They were available?

A. They were available to—50 per cent of those cargoes were to move on American bottoms.

Q. So with respect to the transfer of vessels to

(Testimony of Burton W. Kellogg.)

foreign registry, were there fewer vessels then available for the aid programs?

A. Under the American flag, that is true.

Q. Now, another thing that you did mention in your answer, which I believe requires some clarification. Did you mention with restricted foreign registry something about 50 per cent ownership? I wonder if you could clarify what you mean by that with respect to the original owner and ownership following the sale of the vessel. [49]

A. Well, all transfers are subject to the Maritime Commission's approval and one of their requirements is that 51 per cent ownership in these one-for-one transfers remain with American owners. They didn't care if the original owner sold it to the other owners, as long as 51 per cent remained there, and also that they agreed to respect the restrictions of trading to certain countries in the world the same as American owners agreed to; that is, not to trade with Red China, North Korea, Russia, or any other place that might become unfriendly to the United States to a degree they restrict the Americans. These ships also were restricted from trading in those areas, and they were to be returned to use to the American government in case of war.

Q. But didn't it have to be the same owner?

A. It did not have to be the same owner, no, sir.

Q. As long as they were American?

A. As long as they were approved as reliable citizens.

(Testimony of Burton W. Kellogg.)

Q. Now, following termination of the one-for-one transfer program on December 17, 1954, do you have knowledge with respect to any further announcements by the Maritime Administration concerning agreements executed during the one-for-one transfer period?

A. During that time, after that until January of this year, I am not acquainted with any statement or order issued [50] from the Maritime Administration.

Q. What happened in January of this year?

A. In January of this year the Maritime Administration released——

Mr. Magnuson: Excuse me, your Honor. I don't know about this program and I don't know what he is going to talk about. I believe this is strictly hearsay and——

The Court: It is the kind of thing I would think is susceptible of proof by official documents. But I will allow the witness to refer to it, and then it can be documented later, if there is any question about it. In other words, if you find that there is no official documentation to this, then I will consider this and strike it from my consideration.

Mr. Magnuson: Thank you, your Honor.

The Court: You are welcome. Go ahead. In January of 1960 what happened?

A. (Continuing): January, 1960, the Maritime Administration issued an order which relieved—permitted transfer of Liberty-type vessels to foreign registry to friendly countries, the NATO countries

(Testimony of Burton W. Kellogg.)

and any other friendly country to the United States.

The Court: In effect, with that limitation [51] that you have mentioned, then, releasing the retention agreements pro tonto?

The Witness: This did, in effect.

The Court: In effect, would release those——

The Witness: Retention agreements.

The Court: Those under the obligation of the retention agreements from the effect thereof?

The Witness: Yes.

Q. (By Mr. Quinn): Now referring to the period of time that the one-for-one transfer program was in effect, namely, August 16, 1954, to December 17, 1954, it is our understanding from Mr. Connoy's testimony that you were employed by the Weyerhaeuser Steamship Company to represent it as agent with respect to the retention of several of its vessels of American registry, is that correct? A. As a broker, yes.

Q. As a broker? A. As a broker.

Q. Has your employment with Weyerhaeuser Steamship Company been a continuous one in that it antedated the one-for-one transfer program period?

A. Our firm sold ships to Weyerhaeuser back in the nineteen thirties. Some of the ones that Mr. Connoy mentioned were sold foreign. We have chartered in the early forties with them, and started again chartering [52] practically every year with them from, say, around 1950 onwards.

(Testimony of Burton W. Kellogg.)

Q. So in connection with your continual duties or employment relationship with the Weyerhaeuser Company, did you then inform personnel of Weyerhaeuser Steamship Company with respect to the retention agreement values?

A. Yes. As a matter of fact, I kept Weyerhaeuser completely posted as to the general market trend, the industries' attitude in regard to it, how they felt about it, and when sales of rights were made, and at what price.

Q. Was this a continuing situation of information exchanged between yourself and personnel of Weyerhaeuser Steamship Company?

A. Yes, practically daily. Sometimes several times a day.

Q. Now, with respect to the amounts which were offered for retention agreements, can you first of all give us a little idea about some of the values which were offered during this period insofar as you can recall?

A. There was a hesitation by the industry to do anything directly, and it was sometime in September before I recall hearing of an actual agreement sold, and at that time I believe it was about $32,000. After this occurred there were several pairings where owners had transferred their own ship without a letter or agreement of commitment without having bought a right, as they owned—they could [53] pair their own fleet. This used up a number of vessels that might be available to be committed to American registry and created a little

(Testimony of Burton W. Kellogg.)

tighter market, and the market gradually moved up until it was stabilized for a while around $60,000, and then went up into the high eighties for a short time.

Q. Now, speaking as an expert, which we believe we have qualified you as, do you have an opinion as to what factor caused a value to be placed upon the purchase of a right to the transfer of a vessel foreign by virtue of an agreement to retain?

A. Well, an uncommitted vessel immediately became more valuable than a committed vessel. For obvious reasons, it had the freedom and retained a freedom to sell in the foreign market, which is a much greater market than our American market, and when vessels become uneconomical in American registry, they can usually still find profitable employment under the foreign flag. So that definitely increased the value of the vessel.

As a matter of fact, in September of 1954 the J. Stevenson and Company sold a Liberty vessel for transfer by pairing with an owner for four hundred and ten thousand, while approximately at the same time another vessel that was committed sold for $365,000.

Q. Was there, then, a reasonable relationship or a relationship [54] between the amounts offered for retention agreements? A. Yes.

Q. As bearing upon the difference in value between the committed or uncommitted vessels?

Mr. Magnuson: Objection; leading, your Honor.

The Court: He may answer, I think. Go ahead.

(Testimony of Burton W. Kellogg.)

It is a little leading, but I won't take the time to have him reframe it. Go ahead.

A. Yes, there was a fairly reasonable differentiation between the committed and noncommitted vessels at about the figure of these retention agreements.

Q. (By Mr. Quinn): What was it that made the uncommitted vessels more valuable?

A. The uncommitted vessel was more valuable because it had a freedom to transfer to foreign flag, where you were restricted and restricted—any time you restrict the area in which you can sell a vessel, it is less valuable, and these were not restricted to strictly one market. They had the world market.

Q. Did the problem of ultimate disposal have any bearing? A. I beg your pardon?

Q. Did the problem of ultimate disposal of the vessel have any bearing on the difference in value?

A. Yes.

Q. Or a question, not a problem, but the question of disposal? [55] A. The ultimate——

Q. The point—I mean——

The Court: Start over again.

Mr. Quinn: I am sorry.

The Court: Back up and take another run at it.

Q. (By Mr. Quinn): Did the question which faced every owner of vessels—of a vessel with respect to its final disposition, have some bearing on the value which attaches to a committed or uncommitted vessel?

A. Yes. There is no question about that. It is

(Testimony of Burton W. Kellogg.)

the uncommitted vessel that could go into the foreign market, and after this situation existed, any negotiations we ever had in the sale, purchase and sales market, the very first thing a prospective buyer would say is, "Is this vessel committed or not committed?" They preferred to have the noncommitted vessel when they purchased and were willing to pay more for it than a committed one. There were a few exceptions of people who would gamble on the lower rate and keep it under American flag, but that gave it differentiation.

Q. Did this situation involving the difference in value exist for some time after termination of the one-for-one policy on December 17, 1954, and if it did exist, can you identify some transactions relating to the difference [56] and the dates on which they were consummated?

A. Yes. This did exist, and, as a matter of fact, I have knowledge of sales completed in September of 1956, possibly, and another one possibly early October, 1956. There were two vessels sold: The Western Trader in September at $850,000, and the Murray Hill at the same figure, with delivery in February, March, of 1957.

At the same time a prompt delivery on the Westport, a committed vessel. Incidentally, those two vessels were not committed. The Westport was a committed vessel and sold at $802,000 with a prompt delivery. You can figure that a future delivery like February or March, especially in a high market that existed at that time, is discounted over what we

(Testimony of Burton W. Kellogg.)

consider the spot market. No one would risk a top-of-the-market expenditure for future delivery.

At that same time there was a future delivery of a committed vessel, the Sea Monitor, that went for $750,000. That shows a differential between the Westport, which was sold for a prompt delivery at $802,000, and also at that time the Pacific Ocean was sold at $875,000 with an April delivery, which was the same delivery.

Q. Was that an uncommitted vessel?

A. That was an uncommitted vessel. [57]

Q. Then, in your opinion would there be a difference following the execution of the retention agreements respecting four of its vessels—would there have been a difference in market value between the Weyerhaeuser Steamship Company's four vessels that were agreed to be retained and the three that were not?

A. There would definitely be a difference in the market value for prospective buyers.

Q. Would that correspond to the differences which you noted in your testimony relating to a sale that occurred in 1954? A. Yes.

Q. In your opinion, would that difference have existed in late 1956?

A. It still existed, certainly, through 1956 and into 1957.

Q. And would that difference, in your opinion, although there are, of course, market fluctuations, would that difference have reasonably approximated the amounts received by the committors, those committing or agreeing to retain?

(Testimony of Burton W. Kellogg.)

A. That would fairly approximate it. It would run pretty much hand in hand.

Mr. Quinn: I have no further questions.

The Court: We will take the cross after lunch. Is there any other proof to be offered by either side? [58]

Mr. Quinn: There is none, your Honor.

The Court: Very well. And how long do you wish for oral argument?

Mr. Quinn: I would like to spend approximately a half hour.

The Court: All right. Would you check on the other case to follow and see if they can be prepared at midafternoon?

(Thereupon, the noon recess was taken.) [59]

Afternoon Session

The Court: Would you care to cross-examine?

Mr. Magnuson: May I ask a couple of questions, your Honor?

BURTON W. KELLOGG

having previously been sworn, resumed the stand and testified further as follows:

Cross-Examination

By Mr. Magnuson:

Q. Mr. Kellogg, do you agree with Mr. Connoy's understanding that a vessel once put under foreign flag would not then thereafter be allowed to engage in domestic trade within the United States?

(Testimony of Burton W. Kellogg.)

A. Yes, I do.

Q. Well, then, if an individual was in domestic trade, a vessel having a foreign flag would have no value to it at all, would that be correct?

A. If he was exclusively in domestic trade, that would be correct.

Q. When we talk about value, we have to look to the individual rather than saying as a generality. Would that be a fair statement?

A. No, I don't think that would be a fair statement, because [60] the trade is not where the value of the ship is as a ship sale proposition. That is where the value of the ship is if it is committed to stay American. It changes the value of the ship, so, therefore, that changes the value completely.

Q. Well, when we talk about value, we are talking about what value will be not only to a seller, but to a buyer? A. That is right.

Q. And a foreign flag vessel would have no value to a domestic shipper?

A. It would not to a domestic shipper, but it has a world market.

Q. Well, we are talking about other than a domestic shipper to other buyers that may have a different value, but it wouldn't have the same value, would that be correct?

A. Would you say that again?

The Court: Well, what you mean, in effect, is, if I understand you, is that a shipowner engaged purely in domestic trade would not be likely to be

(Testimony of Burton W. Kellogg.)

in the market for the purchase of a ship that was in foreign registry?

The Witness: Well, that would be correct.

The Court: Is that what you mean?

Mr. Magnuson: Yes, your Honor.

Q. (By Mr. Magnuson): And following that it would have no [61] value to that particular type of buyer?

A. Unless he was going to change his type of business, that is true.

Q. That is right, but if he was to be in that business and wanted to buy a vessel, that type of vessel would have no value to him?

A. That is right.

Q. Now, with respect to vessels under foreign flag, that type of a vessel would not be permitted to obtain American subsidies, would it?

A. No.

Q. And this may be a value, of value to an owner of a vessel under American flag?

A. An owner under American flag would have to apply for subsidy in a trade route, if that is what you mean.

Q. But it may be of value to him?

A. To have—it could be of value to him to have a subsidy, yes, sir.

Q. And if he had a vessel under foreign flag, he would not be permitted to do so?

A. He couldn't come under any of our subsidy laws.

Q. There are certain restrictions as to the type

(Testimony of Burton W. Kellogg.)

and quantity of cargo permitted—well, let me rephrase the question, please.

There are also United States restrictions on [62] the type and quantity of shipments of American goods from America with respect to the registry of a vessel? A. I am——

Q. Do you understand?

A. I think I understand what you are asking, but I don't think you are completely correct in that.

Under the aid program a certain percentage of cargo must go American. Under these aid programs that we had it was 50 per cent. The balance can go on foreign vessels of participating nations, any flag of any of the participating nations. Otherwise, if it is going to Italy, it can go on a French flag. It doesn't make any difference.

The Court: Well, I think what the importance of this question is, is that to the extent of 50 per cent that type of cargo must be borne in the American bottoms; that the opportunity of foreign bottoms to participate in that trade is thereby limited.

The Witness: To 50 per cent.

The Court: Is that about what you mean?

Mr. Magnuson: In part, yes, your Honor.

The Witness: It would be limited to the 50 per cent.

Q. (By Mr. Magnuson): And this also would be of value to [63] one who was engaged in that particular type of trade?

A. Which one are we talking about?

(Testimony of Burton W. Kellogg.)

Q. One carrying American goods.

A. The American flag, or do you mean the foreign flag?

Q. Well, the foreign flag would not be permitted to take in excess of 50 per cent, but only on permission by the Maritime Commission, would that be correct?

A. This isn't controlled by the Maritime Commission. It is controlled by other government agencies.

The Court: By whomever it is controlled.

The Witness: Yes.

Q. (By Mr. Magnuson): By a controlling agency?

A. Yes, but they are entitled to—that commodity is allowed to go 50 per cent of the quantity in foreign flag vessels.

Q. Well, you are talking about the aid program?

A. That is right. That is the only program that I know of with that limitation.

Q. That you know of that has a limitation? This is only as to particular countries, particular flags, under foreign flags?

A. The flags of countries participating in the aid program.

Q. And not all foreign flags? A. No.

Q. So exclusive—no, inclusive of those permitted to ship under the aid program, this would be a value of [64] them? A. Yes, that is true.

Q. And if a vessel was under a flag not within

(Testimony of Burton W. Kellogg.)

the aid program, that vessel would not be permitted under the aid program, if you follow me?

A. Only when there was no other vessel available and they could get a waiver, which is the exception.

Q. And there is that possibility?

A. That is right.

Q. So again we look to the value of a vessel to a particular owner or user. Would that be a fair statement? A. Yes.

Q. And all these have an economic effect upon the vessel and its use?

A. Yes, I think it does.

Q. Now, when you represented the Weyerhaeuser Steamship Company under the arrangement where they executed these agreements for committing their vessel to American flag, you did not make any independent examination of the particular vessels involved, is that right?

A. No. I normally, as a broker, would not examine the vessel in any case.

Q. Well, in this case you did not? A. No.

Q. And in this case you were not interested in physical [65] characteristics of those particular vessels?

A. No, sir, other than that they are Liberty type, American owned.

Mr. Magnuson: No further questions.

The Court: Any redirect?

Mr. Quinn: Only one question, your Honor.

(Testimony of Burton W. Kellogg.)

Redirect Examination

By Mr. Quinn:

Q. Did the fact of availability have value even to one engaged exclusively in coastwise trade?

Mr. Magnuson: I will object; leading and conclusive.

The Court: It is in form subject to that objection. However, he may answer. I think he will answer according to his views, despite the suggestions given to him in the question.

The Witness: I wish you would rephrase that. I didn't understand it.

The Court: Of course, that is what I should have asked for.

Q. (By Mr. Quinn): Perhaps I can rephrase it this way: To a steamship operator engaged exclusively in intercoastal trade, did the fact that the vessel could qualify for foreign transfer have some value? [66]

A. Yes, definitely it had a value. If it was free to transfer, it opened up a wider market.

The Court: You have covered that on direct pretty well.

Mr. Quinn: I got it the first time.

That is all, your Honor.

The Court: That is all. Thank you, Mr. Kellogg.

(Witness excused.)

The Court: Anything further in the way of evidence?

Mr. Quinn: No, your Honor.

The Court: Either side? Both parties rest?

Mr. Magnuson: No, your Honor. I was waiting for them to say they rest.

Mr. Quinn: We rest.

The Court: All right.

Mr. Magnuson: If it please the Court, I would like to move to make a part of the record the depositions taken by the plaintiff of a Mr. Ford who is a member of the Maritime Administration, and have that testimony of that deposition included in the record.

Mr. Quinn: We join in that, your Honor.

The Court: Very well. I take it that it is [67] agreeable that I read it myself without the formality of your reading it to me?

Mr. Magnuson: No, your Honor, unless you wish me to.

The Court: Either one of you may emphasize or talk about anything that is in it in your argument or otherwise, but if you agreed, I will read it and that can be done much more readily and quickly than by having it formally read back and forth, if you agree.

Mr. Quinn: Satisfactory, your Honor.

The Court: I will read the deposition in full and deem it a part of the testimony in the case to the full extent as though read into the record at this time.

Mr. Magnuson: No further evidence.

The Court: Defendant rests as well. Very well. I think you have agreed that a half an hour a side

should be adequate for the oral argument. You may proceed to do that.

Mr. Quinn: In closing, your Honor, now that the deposition to which we have just referred is part of the record, might I state that in support of Mr. Kellogg's statement that the Maritime Administration formally acted following the termination [68] of the one-for-one program in December of '54, as a matter of formal announcement, is contained as an exhibit in the deposition? At this time, as I understand it, it now becomes a part of the record, it is identified there.

I am offering this as support for Mr. Kellogg's statement with respect to a formal announcement.

The Court: Yes, I see it here.

Mr. Quinn: In closing I want to spend just a little bit of time on the facts which are established by the testimony in this case. I will not refer to the admitted facts. I am trying to save time.

The right to transfer foreign insofar as the Maritime Administration is concerned, was a valuable property right which inhered in the ownership of a vessel. Now, irrespective of whether or not the Maritime Administration is in a position to talk about something as a property right within the meaning of law in general is not that to which I am referring. I am saying insofar as the Maritime Administration was concerned, they felt that the right to transfer foreign was a basic property right. It inhered in the ownership of a vessel. All the Shipping Act of 1916 did was give them authority [69] when the national economy and defense dictated

otherwise to control the transfers. This is supported by Mr. Rothchild's statement as contained in the record in what has been identified as pretrial Exhibit No. 7.

Secondly, in implementing its considerations with respect to whether or not it would allow vessels to transfer, it did on August 16, 1954, promulgate this new transfer program. It did this, and again this is phrased in terms of Mr. Rothchild's press release, which has been identified as pretrial Exhibit No. 1. It did this to alleviate a very bad financial situation which faced American flag operators, that following a four-month period during which some sixty-nine vessels were allowed to transfer, the financial conditions or problems that faced these owners had been somewhat removed because foreign flag operators had been allowed to transfer out and get the benefits of being foreign flag operators—excuse me, American flag operators had been allowed to transfer out and get the benefit of foreign flag operation, at the same time cutting substantially the amount of American flag Liberties that were available to participate in the aid programs that were available. This is set forth in the termination announcement, press release, relating to the press release of the one-for-one policy, which has been identified in the record. [70]

Now, I think that Mr. Connoy has supported our contention that a steamship operator, such as Weyerhaeuser Steamship Company, while it was not interested in operating as a foreign flag vessel owner or operating in the foreign commerce or

foreign trade, it nevertheless was most interested in where it would finally dispose of these assets at the end of their economic life. It obviously had to have available to it a market place in which to dispose of these vessels.

Now, by agreeing to retain its vessels in American registry insofar as it was aware perpetually, it automatically foreclosed itself from disposing of a vessel in the foreign market. Now we are talking in terms not of the use of the vessel but of the ultimate sale of the vessel. This was the thing which attaches value to a coastwise operator in the availability of his vessels for foreign transfer, and for that reason, when it gave up this right and sold it to another so as to perfect his right to transfer foreign, it had to look to the compensation which was paid for the purchase of that right to offset the loss to the owner of the foreclosure of one of its ultimate market places for disposal.

It is on this basis that we contend that there has been a sale of property; namely, the basic property right inhering in a vessel to alienate such vessel freely [71] without restraint, and that in so disposing of this property right it found itself in a situation where it knew that it would not be able to dispose of the vessels at all when and if the time occurred that at the date of disposal there was no market. So it had to look to this compensation to offset two things: The loss of the market and the loss of the tax treatment which it could have received had it sold its vessels at the time the Maritime Administration opened up the one-for-one pro-

gram, because Weyerhaeuser Steamship Company under the one-for-one program could have sold three vessels to foreign registry. It could have taken advantage of the tax benefits which would have inhered in that transaction because that would have been a capital transaction.

So, what we are contending, and we believe this is supported in the record, is that in giving up this right and selling it to another, it was taking in advance of an ultimate disposal a portion of the gain that would have resulted to it had it gone out then and sold its vessels to foreign owners, and we are couching—or I should say we have always looked at this transaction in the sense that what was received is in effect part of the gain which would have resulted from the sale of the vessel. It is just a routine way of taking now what you could have gotten had you decided to sell. Now, this fact of agreeing to retain [72] and sell this property right immediately resulted in a difference in market value, which has been testified about this morning, and at a difference in value which existed not only during the one-for-one program, but which existed at least with respect to the testimony as late as some two years, plus, afterwards. I think this supports the contention that a property right was sold; that one of the sticks is gone.

This vessel in the market place now, if it is a committed vessel, just doesn't have the same value as the uncommitted vessel, despite the fact that they are both still American flag vessels. There has to be a reason, and that reason is that one of the prop-

erty rights respecting the vessel is gone, and the industry attached value of that property right, as demonstrated by what they were willing to pay for the two kinds of American flag vessels.

Now, I think that the difference in market value also demonstrates another point; that at the end of the one-for-one program on the termination date the Maritime Administration said nothing in its press releases respecting the agreements of retention that have been executed. They said nothing about the Liberty-type vessels until January of 1960. At least insofar as the trade is concerned, the commitments or letters of retention or [73] agreements of retention, no matter what terminology we want to use, were considered by the industry to be binding upon the owners.

On December 17, 1954, it did nothing to the vessel owners who had agreed to retain their vessels in American registry. It purely said, "We will no longer consider any more applications under the one-for-one program." So, at least I think it is established in the record, I believe it is established in the record, that the commitments or agreements or letters respecting which a property right had been sold were binding upon the owners or the vessels, themselves, if they were transferred among American owners throughout at least a two-year period following 1954, or at least until 1960, when the Maritime Administration formally acted otherwise.

I think that that is about as far as I need go in summarizing the facts. I think this is the essence

of the transactions insofar as the plaintiff is concerned. It has been our contention that, at all times, that the plaintiff gave up a basic property right, and the reason that that is a sale of the property right is because it was necessary for the one seeking foreign transfer to perfect his right by demonstrating he purchased, in effect, the other vessel owner's right in order to perfect his own right to transfer foreign. There is a transfer of [74] property between the owners, and it is not a promise not to do something. It may, in terms of the agreement—the agreement, of course, is couched in terminology of buy and sell. It is recognized this doesn't bind the Court. You can look to the substance rather than the form. So you have to examine the transaction, and it is our position that the vessel owner seeking foreign transfer had to purchase somebody else's right to perfect his own right, and there was a transfer which occurred between the parties.

Now, we have set forth in our brief the authorities upon which we rely. I am not going to go through all of the cases, because I know the Court will be familiar with those, or is already. I think that perhaps I would like to take just a few moments to talk in terms of what I think to be a case which is fully in support of our position and to talk a little bit about the government's position with respect to the transactions.

Just to sum up our own position, we feel this is a property right. It is a Section 1231 property right. That there has been a sale, and that this is a capital transaction resulting from the conversion of a cap-

ital asset. That is almost an aside with respect to what you do with it, once having established that.

I will sum up at the end, but right now I am [75] trying to get through the main issue, which I think in the case is whether or not this is a capital transaction. Now, as contained in our pretrial order and as contained in our brief, the government's position, I think, is summed up in Revenue Ruling 58-296, the citation to which is in both the pretrial order and the brief.

Now, this ruling talks in terms of the rights as being temporary privileges created and suspended by administrative action of a governmental agency.

Now, I submit that the Internal Revenue Service in promulgating this regulation misapprehended the effect of the one-for-one transfer program in that the Revenue ruling is couched in terminology of something which on August 16, 1954, was created.

Well, if we are to believe the exhibits that have been introduced into evidence and the testimony which has been given here since the beginning of time insofar as the American Merchant Marine is concerned, you always had the right to transfer your vessel to whom you pleased, and all that the Maritime Administration does, of course, it is a supervising agency to regulate that right as the dictates of the economy and defense should indicate; that on August 16, 1954, nothing magic occurred in the sense of creating a right where none existed. It purely said, "We have a very bad financial situation facing all [76] American flag owners. We want to do something about this to free some

of the vessels for foreign flag operation as foreign flag operators. Consequently, we are going to put into effect an almost automatic program."

So it created nothing. It merely clarified something, or brought into the forefront something which had been heretofore examined on a case-by-case basis.

The second point in the Revenue ruling that is quite bothersome to us is that it talks in terms of "the thing," if we want to call it "the thing," purchased by the payor as being something of value which attaches to the ownership of his vessel, as if to say, "You, Mr. Payor, bought something at the time you purchased somebody else's"—we will call it agreement to retain—"and this is property, and we are going to have you add that to the cost basis of your vessel."

But, on the other side they turn around and say to you who sold it, "You really haven't done anything, because it is only a temporary privilege that was created and suspended. You haven't given up anything. So you have got to treat it as ordinary income."

The overtones of having your cake and eating it, too, which exist in this ruling, are, we think, fairly obvious.

Now, it is recognized, of course, that you do [77] have situations in tax law where you can have a capital acquisition on one side and an ordinary income transaction on the other side. But these situations involve those cases wherein the person who must treat it as ordinary income has, in effect,

rendered some service. I am thinking in terms, now, of the cases where there is a covenant not to compete, purchased at the time you purchase a going business, and that is, forebearance from competing, is, in effect, a service which he renders to the purchaser of the business; and despite the fact that the purchaser must capitalize that expenditure, insofar as the recipient is concerned, it is payment for something which he does not do or does do, depending on how you want to look at it.

So, I think this is, the effect we get from this ruling is that there is a feeling on the part of the Internal Revenue Service that we are rendering some service. Excuse me. When I talk of "we," I mean the steamship company is rendering some service when we don't try to transfer our vessels foreign.

The answer to that one is that we couldn't. We, the steamship company, couldn't transfer vessels foreign, even if we wanted to break our promise, because the right, once it is sold, is gone. The Maritime Administration wouldn't even consider an application once you have committed your vessel to remain. So, once you have entered [78] into this agreement, there is nothing upon which you could be called upon to do or not to do with respect to the right to transfer foreign. It is gone. You have no recourse but to live with your agreement, and your compensation must compensate you for what you gave up as a result of selling that right.

In our situation, Weyerhaeuser Steamship Company as a coastwise operator, we gave up the right

to dispose of our vessels in the foreign market. The payments received were compensation for this. They represent part of the gain we could have recognized had we been those who sell those ships at that time. We have foreclosed ourselves from one market and we have given up a right. We must sell our vessels in the American market, even though we know five years later the Maritime Administration released us from those obligations. We must look at this as of the year during which it occurred, and at least for two years, plus, afterwards we have demonstrated there was a difference in value, had we sought to sell our ships then, and what happens in subsequent years, of course, can explain things that have happened during the taxable year. But they aren't determinative of what happened in the taxable year. So, insofar as Weyerhaeuser Steamship Company is concerned, when it executed its agreement, sold its rights, for all it knew it could have been perpetually bound to [79] its agreement throughout the balance of the economic life of its vessels.

Now, secondly, the government relies on the Terminal Steamship Company case, which is cited in the brief, both briefs. As a matter of fact, it was a tax court decision which was very recently decided, substantially the same, or I should say the issues involved are the same, were substantially similar facts, except that in the Terminal Steamship Company case, the person seeking to treat the proceeds from a sale of its agreement to retain had only one vessel; would have had no right to transfer foreign

unless it paired up with another owner. This is a factual distinction, but we are making not a real note of the fact there is a factual distinction, because we think in that Terminal Steamship Company case the court misapprehended the effect of the one-for-one termination announcement in that the tax court in that case concludes that on December 17, 1954, everybody was back where they started from; that on that date apparently, the way the tax court looks at it, the commitment of agreements, letter of retention, agreements of retention, were no longer binding. You obviously had, well, they even assume you have given up a property right and you got it back on December 17, 1954. We submit that this just is not the case.

Our testimony supports the fact that at least for [80] two years, plus, or more, following the termination of the one-for-one program the commitments, agreements, continued to bind the owners who had executed them; that you were not back where you started from on December 17, and you didn't get back where you started from until the Maritime Administration took a formal position with respect to releasing the vessels from their obligations.

The third case or third thing to which I want to refer briefly in my remarks is that the government has relied somewhat in its brief, and it has been cited in our own brief, on the Gillette case, which is a recent United States Supreme Court case. There is some language in that case used by Mr. Justice Harlan that would lead one to conclude

that the type of thing involved, which is not at all like what is involved in this case, but talking in terms of these various species of rights which are not given capital gains consequences, he seems to talk in terms of this particular—a particular right in this case, the right to use property as not being a capital asset.

Now, of course, we factually distinguish the Gillette case from our own in that we are not talking about the right to use property, we are talking about the right to ultimately sell property. But the Gillette case is correctly decided, despite some of the broad-reaching statements contained in the decision or opinion. It is correctly [81] decided because in that case the motor company, which had been seized temporarily during World War Two and for which the motor company had been compensated for the loss it suffered as a consequence of government operation, the Gillette Company received nothing but the rental value of its facilities, which would have been ordinary income had it been forced into a lease situation, which is in effect what occurred in that case. There had been an involuntary lease, and even the ordinary income which that company earned during government control was left in the business and credited against the final award made by the government. Mr. Justice Harlan says that, in effect, this would have been rental income, "had you leased your facilities to somebody else." It would have been ordinary income if it were rental income.

So, even though we are talking in terms of a

temporary seizure which has capital asset overtones, conversion of capital asset overtones, nevertheless we look through the form of the terms used by the various governmental agencies and what not that were involved and look to see what actually happened; and all that happened was that somebody came along and took your facility for a ten-month period, and in taking that facility, albeit involuntarily, you would have received rental income and, therefore, despite the fact that this is a seizure [82] argued to be treated as such under Section 1231, you received nothing other than rental income, and it would be ordinary income.

Now, the case on which we rely to a great extent is the Louis Ray case which is cited in our brief. The court of appeals in considering that decision was, I should say seemed to be so impressed by the tax court opinion that it adopted it almost in toto, and, therefore, you have a taxpayer lessee who, in negotiating the lease, had received from the lessor a promise or covenant not to lease the balance of the premises which the lessor owned to a competitor. About two years before the lease expired, the lessor wished to sell the premises to another, but his prospective purchaser said, "I don't want this because of this negative covenant. I don't want to be restrained from whom I can lease the balance of the premises."

The lessor then went to the lessee and said, "What will it cost for you to give me back that promise?" And the lessee finally agreed to $20,000. The question is now, what do you do with the $20,-

000? Well, the lessee in that case had nothing other than a right to enjoy a monopoly. That is the way I like to look at it. And in considering giving up that right to a monopoly, he decided that $20,000 would compensate him for the release of that right to a monopoly, probably in the sense of profits, [83] taking the place of lost profits, and so forth. So he relinquished his right, and in relinquishing that right, the tax court said that one is property, albeit only a right relating to use of property it is still property. The relinquishment is a capital transaction, and that there has been a sale or transfer within the meaning of the capital gains and assets and property transaction provisions of the Internal Revenue Code.

Well, to me I think the case, although it is not, of course, by any means on all fours with our own, it is quite analogous in that we relinquished a right to sell our vessels in the foreign market, and in so relinquishing that right to put it back over here, the one who sought foreign transfer, there was a transfer, and there was a transfer of property, and, at least according to the tax court opinion and the Louis Ray case would have been treated as a capital transaction. This to me, from research that's been done in connection with the case, is the closest case that I can find to what we have before the Court today.

I want to emphasize, and I want to save just a few minutes for rebuttal, I want to emphasize that we have here no service to be rendered in connection with our agreement to retain. The steamship

company agreed to retain our vessels in American registry. There was nothing [84] further for anybody to do, and while it might look like a promise not to do something, it also went further in its effect on barring you from the foreign market. So, you had given up something, not only in the sense of a promise not to do something, but you had given up one of the avenues available for ultimate disposition of your vessel. This right went over to the other vessel owner, who sought it to perfect his right for foreign transfer. So, within the language of the Louis Ray case to the Weyerhaeuser Steamship Company there has been a sale of property use in the trade and/or business within the meaning of Section 1231.

The Court: Thank you, Mr. Quinn. Mr. Magnuson?

Mr. Magnuson: May it please the Court, in viewing the position taken by the plaintiff in this case, the defense feels that its position belies its own weakness in that the plaintiff does not say that there is a sale, but that the transaction with which we are concerned in this case is a substitute for a sale. In that respect the defense feels that this supports its contention that not only was there a sale in this particular situation, but there was not a sale of property, and following that there was not a sale of property used in a trade or business. It appears that principally a contention supporting a reasoning that there is a sale is based upon a conclusion [85] that the transaction resulted in something that would be a permanent bind upon the

use, transfer, sale, or whatever the steamship company wished to do with its particular asset, the vessels in question. And with this I suggest to the Court that we have a finding of fact which the Court will find from a reading of the transactions themselves, the agreements, which the defense feels does not in any way support its conclusion that the execution was one of permanency, but rather was executed under the policy then set out by the Administration, by the Maritime Administration.

Also, in the wording or the testimony of the deposition taken by the taxpayer of Mr. Ford of the Maritime Administration, he made or emphasized that the commitments, whatever they may be, did not—it was my interpretation of his testimony did not have effect after the December 17 date, and that after that date uncommitted or committed vessels were treated on the same basis, although he did go further to state that no committed vessel was permitted to go to foreign flag, I believe, until some time in the year 1956. However, he did further state that no vessel committed to American registry had applied for foreign flag until that time, nor to his knowledge had one been denied transfer to a foreign flag during the period up to the first request for approval for a transfer [86] of a committed vessel to a foreign registry.

With respect to the law in this case, the defense submits that we must look at these transactions and distinguish that which is a use from that which is a transfer of property, and feel that in this case not only was there not a sale, but that the amount

of money received by the taxpayer represented something other than receipt from the sale or exchange of property, and as such should be treated as ordinary income.

I might say at this time that all the theories presented on behalf of the plaintiff have not been answered by our brief, and with that I would like to request the Court that we be permitted time in which to file and answer or reply to many of the theories raised during the course of this trial and in their briefs submitted prior to the commencement of the case before the Court. With that I only request the Court to recognize our position and recognize that we feel that the issue in this case is one in whether or not there was a sale and that there was a sale; whether or not there was a sale and whether or not there was a sale of property. And we urge upon the Court that there is no showing either by the testimony or by the agreements or by the pretrial order that there was a sale of property which would permit them to treat this sale as a sale of asset used in trade or business within the [87] meaning of Section 1231 of the Internal Revenue Code of 1954.

Thank you, your Honor.

The Court: Would you like to reply, Mr. Quinn?

Mr. Quinn: Just to one point with respect to Mr. Magnuson's argument. He refers to Admiral Ford's testimony as contained in the deposition, which does talk in terms of transfers of committed vessels allowed during the period subsequent to the termination of the one-for-one program prior to January of this year.

I merely want to point out to make it clear that Mr. Kellogg's testimony, his initial testimony was that there were two transfer programs in existence throughout this period. They have been identified in our brief, but just to bring it to the Court's attention, one of the programs relates to a trade out and build situation where you agree to replace the vessel transferred to foreign registry in an American shipyard with new construction.

Throughout this period, this avenue of transferring a vessel foreign we believe to be available to persons who owned Liberty vessels. I merely wanted to point out that the transfers of committed vessels which occurred, I think, in late fall of 1956, which is set forth in the deposition, were under that other program; that they were not release of committed vessels free of commitment to [88] replace the vessels transferred in American shipyards.

With respect to the filing of a brief, the only thing that the plaintiff desires is some time in which to respond.

The Court: How much time do you want, Mr. Magnuson?

Mr. Magnuson: If I might for safety ask for thirty days, I would appreciate it.

The Court: Well, I see no reason why you shouldn't have it, unless you see some reason.

All right. You can take a like period for any reply that you may wish to make, although I suspect you won't need that much. But if you do, you will have it, or you might get tied up with something else.

Incidentally, when you submit your brief, I wish you would along with it submit your proposed findings, serve them. That will give the plaintiff's counsel an opportunity to supply counter proposed findings. Make your proposed findings on all the data that is stipulated, and so on, in such a form as not to require a redo of that material as far as you can. Then when the memoranda are submitted and the proposed findings are submitted, that will minimize further concern after the Court decides the case.

Is that clear? [89]

Mr. Magnuson: Excuse me, your Honor. It may well be that we might wish to have portions of the transcript or the whole transcript. Could that thirty days commence after the receipt of that?

The Court: If you order it right now, if you order it in the next day or two.

Mr. Magnuson: Yes, your Honor.

The Court: In other words, I don't want to wait thirty days to order and then——

Mr. Magnuson: No, I didn't have that in mind.

The Court: I knew you didn't, but provided you order it within a few days, why, the thirty days will run from the time you get the transcript.

It is a very interesting case and very interesting question presented, and I will enjoy working on them and examining all of this material much more closely than I have had an opportunity to do thus far.

Recess subject to call.

(Whereupon, the court recessed subject to call.) [90]

Certificate

I, Gerald J. Popelka, official court reporter in and for the United States District Court, Western District of Washington, do hereby certify that the foregoing transcript of proceedings is a full, true, and correct transcript of proceedings had in the within-entitled and numbered cause in the above-entitled court on the date hereinbefore set forth.

I do hereby certify that the foregoing transcript of proceedings has been prepared by me or under my direction.

/s/ GERALD J. POPELKA.

[Endorsed]: Filed December 6, 1960.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Harold W. Anderson, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 75(o) of the Federal Rules of Civil Procedure, and Subdivision 1 of Rule 10 as amended, of the United States Court of Appeals for the Ninth Circuit am transmitting herewith such of the original papers and pleadings and exhibits in the above-entitled Cause as are designated by the parties hereto, and the said papers and plead-

ings and exhibits herewith transmitted constitute the Record on Appeal from that certain Judgment of the above-entitled Court filed and entered on March 23, 1961, to the United States Court of Appeals for the Ninth Circuit at San Francisco, California, are identified as follows:

1. Complaint (and exhibits A through F attached thereto).
2. Answer.
3. Pretrial Order dated October 17, 1960.
4. Pretrial exhibits 1 through 9.
5. Deposition of Walter C. Ford taken at Washington, D. C., on October 28, 1960 (Verified copy substituted).
6. Transcript of proceedings held November 17, 1960.
7. Stipulation dated December 8, 1960, correcting transcript of proceedings.
8. Memorandum Decision by District Court.
9. Findings of Fact and Conclusions of Law.
10. Judgment.
11. Bill of Costs.
12. Notice of Appeal.
13. Costs bond.
14. Stipulation & Order substituting copy of Deposition of Walter C. Ford for original Deposition.
15. Designation.

I do further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office on behalf of the

parties hereto for the preparation of the Record on Appeal in this cause, to wit:

Notice of Appeal (Plaintiff), $5.00, and that said fee of $5.00 has been paid to the Clerk by Plaintiff.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Tacoma, Washington, this 19th day of June, 1961.

[Seal] HAROLD W. ANDERSON,
Clerk;

By /s/ [Indistinguishable],
Deputy.

[Endorsed]: No. 17436. United States Court of Appeals for the Ninth Circuit. Weyerhaeuser Steamship Company, Appellant, vs. The United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed June 20, 1961.

Docketed July 10, 1961.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 17436

WEYERHAEUSER STEAMSHIP COMPANY,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS

Pursuant to Rule 17(6) of the Rules of the Court of Appeals for the Ninth Circuit (U. S. Ct. of App., 9th Cir., Rule 17(6), 28 U.S.C.A.), the points upon which the appellant intends to rely on appeal in this cause are as follows:

(1) The District Court erred in its finding of fact:

"It was within the power of the Maritime Administration to withhold the privilege of a shipowner to transfer its vessels to a foreign registry." (Finding of Fact No. 4; Findings of Fact and Conclusions of Law, page 2.)

(2) The District Court erred in its finding of fact:

"In return for its agreements temporarily to retain four of its seven Liberty vessels under United States registry, Weyerhaeuser received, from the owners of the four vessels transferred foreign, the

sum of $291,437.50." (Finding of Fact No. 7; Findings of Fact and Conclusions of Law, page 3.)

(3) The District Court erred in its finding of fact:

"After the expiration of the 'one-for-one' policy in December, 1954, retention agreements such as the four executed by Weyerhaeuser, were no longer considered as binding by the Maritime Administration. After the expiration of this temporary policy, when a shipowner requested allowance to transfer foreign a vessel which had been committed to United States registry during the period of the 'one-for-one' policy, it was given the same consideration by the Maritime Administration as was afforded to owners of vessels which had never been committed to United States registry during the temporary 'one-for-one' policy. Owners of committed ships, such as Weyerhaeuser, had the same privileges as to transfers foreign as did owners of non-committed ships, since each was treated equally and given the same consideration as to transfers foreign by the Maritime Administration." (Finding of Fact No. 8; Findings of Fact and Conclusions of Law, page 4.)

(4) The District Court erred in its finding of fact:

"After the termination of the temporary 'one-for-one' policy, Weyerhaeuser had the same rights with respect to the transfer foreign of its 'committed' ships that it had prior to its entering into

the 'commitment' agreements and prior to the adoption of the 'one-for-one' policy." (Finding of Fact No. 10; Findings of Fact and Conclusions of Law, page 4.)

(5) The District Court erred in its finding of fact:

"Under the 'commitment' agreements, Weyerhaeuser agreed to use its ships only under United States registry until the 'one-for-one' policy was terminated." (Finding of Fact No. 11; Findings of Fact and Conclusions of Law, page 4.)

(6) The District Court erred in its finding of fact:

"Under the 'commitment' agreements, Weyerhaeuser agreed to forebear from requesting permission of the Maritime Administration to have four of its Liberty vessels transferred to and used under foreign registry." (Finding of Fact No. 12; Findings of Fact and Conclusions of Law, page 4.)

(7) The District Court erred in its conclusion of law:

"The income tax deficiency assessed by the Commissioner of Internal Revenue and collected from the plaintiff for the taxable year 1954 was proper and no refund is due under the claim asserted in this action." (Conclusion of Law No. 2; Findings of Fact and Conclusions of Law, page 5.)

(8) The District Court erred in its conclusion of law:

"The presumption favoring the correctness of the Commissioner's assessment is fully supported by the facts and law material to this case." (Conclusion of Law No. 3; Findings of Fact and Conclusions of Law, page 5.)

(9) The District Court erred in its conclusion of law:

"The transactions involved in this action did not result in the sale or exchange of property, capital assets or property used in the plaintiff's trade or business within the meaning of Sections 1221 and 1231 of the Internal Revenue Code of 1954." (Conclusion of Law No. 4; Findings of Fact and Conclusions of Law, page 5.)

(10) The District Court erred in its conclusion of law:

"Plaintiff received the amount of $291,437.50 in return for its agreement to forebear from applying to the Maritime Administration for permission to have its Liberty vessels operated under foreign registry." (Conclusion of Law No. 6; Findings of Fact and Conclusions of Law, page 5.)

(11) The District Court erred in its conclusion of law:

"The payments received by the plaintiff for its agreements to retain its vessels in American registry constitute ordinary income within the meaning of the Internal Revenue Code" (Conclusion of Law No. 7; Findings of Fact and Conclusions of Law, page 5.)

(12) The District Court erred in its conclusion of law:

"The amounts received by the plaintiff under its retention agreements did not reduce the bases of the plaintiff's vessels." (Conclusion of Law No. 8; Findings of Fact and Conclusions of Law, page 5.)

(13) The District Court erred in its conclusion of law:

"The defendant is entitled to judgment in its favor dismissing plaintiff's complaint with prejudice and awarding defendant its costs and disbursements herein." (Conclusion of Law No. 9; Findings of Fact and Conclusions of Law, page 5.)

(14) The District Court erred in failing to find and conclude that the Maritime Administration, acting pursuant to the powers conferred upon it by Sections 9 and 37 of the Shipping Act of 1916 (U.S.C. Title 46, Sections 808 and 835), has continuously treated the control granted it by Congress over foreign transfers of American flag vessels as a restraint upon the exercise of a property right inhering in the ownership of a vessel and not as a grant of absolute power to confer or withhold the privilege of foreign transfer.

(15) The District Court erred in failing to find and conclude that the Maritime Administration, in terminating its "one-for-one" foreign transfer policy, did not release any of those vessel owners including appellant, who had executed retention

agreements, from the obligation of retaining the vessels in United States registry.

(16) The District Court erred in failing to find and conclude that no dry cargo Liberty-type vessels respecting which retention agreements had been executed were permitted to transfer to foreign registry, without replacement thereof by new construction in an American shipyard, until January 25, 1960.

(17) The District Court erred in failing to find and conclude that as a consequence of the execution of a retention agreement, which effected a bar until January 25, 1960 (permanently so far as appellant knew on the date its agreements were made), to sale of the committed vessel in the foreign market, there was a substantial difference in value between committed and uncommitted vessels reflecting the adverse effect of limiting the sale of these vessels to the American market, which difference continued long after termination of the "one-for-one" transfer policy.

(18) The District Court erred in failing to find and conclude that one of the property rights inherent in the ownership of any asset is the right to sell or otherwise relocate such asset and that the right to transfer a vessel to foreign registry is such a property right.

(19) The District Court erred in failing to find and conclude that appellant, in executing agreements retaining four of its dry cargo Liberty-type

vessels in United States registry pursuant to the Maritime Administration's "one-for-one" transfer policy, sold property governed by the provisions of Section 1231 of the Internal Revenue Code of 1954.

(20) The District Court erred in failing to find and conclude that in computing its Federal income tax liability for the taxable year 1954 appellant is entitled to treat the payments received for retaining its vessels in United States registry as proceeds from the sale of property used in the trade or business and held for more than six months within the purview of Section 1231 of the Internal Revenue Code of 1954.

(21) The District Court erred in failing to find and conclude that because no part of the basis of any of appellant's vessels is allocable to the property sold, appellant, in its return, is entitled to apply the receipts in reduction of the basis of vessels respecting which agreements were made.

(22) The District Court erred in failing to find and conclude that on its claim for refund of income tax paid for the taxable year 1954, appellant is entitled to a judgment against appellee in the sum of $185,834.60, together with interest thereon at the rate of 6% per annum from December 23, 1958, as provided by law.

Dated this 5th day of July, 1961.

/s/ RICHARD K. QUINN,
Attorney for Appellant.

[Endorsed]: Filed July 6, 1961.

No. 17,446

United States Court of Appeals

For the Ninth Circuit

NATIONAL UNION FIRE INSURANCE CO.,
Appellant,

vs.

LUISA SANTOS,
Appellee.

Appeal from Final Judgment of the District Court of Guam Civil No. 32-60

OPENING BRIEF OF APPELLANT NATIONAL UNION FIRE INSURANCE COMPANY

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No. 17,446

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Appeal from Final Judgment of the District Court of Guam Civil No. 32-60

OPENING BRIEF OF APPELLANT NATIONAL UNION FIRE INSURANCE COMPANY

JURISDICTION

The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal pursuant to 28 U.S.C. sections 1291 and 1294, and 48 U.S.C. section 1424; said appeal being from a judgment of $10,000.00.

STATEMENT OF THE CASE

Appellees sued in the District Court of Guam upon a policy of fire insurance issued to appellant. (Pl. Ex.

1.) The policy insured a one story building, located in Merizo, Guam, in the amount of $8,000.00; Endorsement No. 2 of the policy specifically declaring that with respect to the insurance on the building the policy was a Valued Policy issued in accordance with sections 43356 and 43408 of the Government Code of Guam. (Pl. Ex. 1.) The remaining $2,000.00 of the policy covered the contents of the building. (Pl. Ex. 1.)

The Pre-Trial resulted in issues pertaining to insurable interest and coverage. It was stipulated that fire totally destroyed the building and contents covered by this policy.

Shortly before the fire appellee homesteaded this building, her residence, and taking the value assessed by the government in her homestead declaration, she declared the property to be valued at $3,210.00. (T. 21-22; 52-53.)

Appellee testified that she had been living with Gregorio Sanchez for three years, since before the house covered by the policy was built, and that Sanchez did not own any of the personal property or any part of the house. (T. 39.) Appellee admitted Sanchez contributed towards the purchase of some of this property, but she claimed that Sanchez gave it to her. (T. 40.) Appellee further testified she owned the house that burned. (T. 54.) Appellee specifically testified to all items of the contents of said building as set forth in Plaintiff's Exhibit No. 3, according to her estimated value of her loss; excepting the lump sum testimony of $500.00 for clothing, pillow cases,

bed sheets, bedspreads and towels, appellee's loss of personal property amounted to $1,600.00. (Pl. Ex. 2; T. 26-30.) (Pl. Ex. 2 contains error in addition; $2,122.50 should be $2,100.00.) In computing her estimate of $500.00 for the clothing, etc. appellee included 15 dresses of her 13-year-old married daughter. (T. 29; 50.) Appellee testified that this daughter had 15 dresses, 5 of which were new, the highest cost of any dress being $12.95, but some cost less. (T. 49.)

Appellant's sole witness, Gregorio Sanchez, testified that he had been living with appellee for three years (T. 66-67) and contributed 50% of support of the household, (T. 69) and that he made payments on some of the property destroyed in the fire. (T. 72.) Then, appellant commenced to question Sanchez about who built the house that burned down; (T. 72-73) the Court refused to allow appellant to question Sanchez as to what he contributed to the building or to ownership thereof. (T. 73-74.)

The jury returned its verdict for appellee, $8,000.00 for real property and $2,000.00 for personal property (T. 96-97), and appellant appealed from this judgment. (T. 12.)

SPECIFICATION OF ERRORS

1. **The Court erred in refusing to allow appellant to examine its sole witness with regard to whether he possessed any interest in the insured real property (pp. 72-74)**

(Testimony of Gregorio Sanchez)

"Q. Now who built that house?

A. Pardon me?

Q. Who built the house that burned down?
A. Who built?
Q. Uh huh.
A. A carpenter by the name of Vicente—Jose Tapasna.
Q. He the only person that worked on that house?
A. I worked and some free labor, free hands.
Q. Where did the material come from?
A. It came from various stores in Agana.
Q. Was it all new material?
A. Approximately all new.
Q. All new roofing?
A. Right.
Q. Roofing iron, everything all new. It came from various stores in Agana?
A. Right.
Q. Did you buy any of it?
A. Pardon me?
Q. Did you buy any of it?
A. Some.
Q. Can you tell us what you bought and where you bought it?

Mr. Barrett. Your Honor, this has gone on for a long time and I fail to see the relevancy of what Mr. Crain is driving at, what went into the house, where the materials came from. The house, it has been testified, belonged to Mrs. Santos. If he can prove it doesn't belong to her, that is something else.

Mr. Crain. I think we are entitled to inquire into it. I am not sure who any of this property belongs to at the moment.

The Court. You lay your foundation. Do you know that she did not, the insured did not own the real property?

Mr. Crain. Perhaps she didn't own the sole interest in it and especially the personal property.

The Court. I am going to limit your questions of this witness, if you intend to lay a foundation that someone else owns the personal property other than the witness. As far as the real property is concerned, that speaks for itself, is a matter of record and the proof of loss and policy, the real property, itself. If it can be shown you are putting this witness on the stand to bring out the ownership of the personal property, that the personal property, this was not owned by the insured, it is owned by someone else, let's get right down to the point."

2. **The evidence is insufficient to sustain the jury's verdict and the judgment allowing appellee $2,000.00 for loss of personal property**

SUMMARY OF ARGUMENT

An insured must have an insurable interest in the property, and a Valued Policy while settling the value of the property in the event of its total destruction does not determine the extent of the insured's interest in said property. In the event the insured possesses less than the total interest in the insured property the insured can recover, even under a valued policy, only to the extent of her interest. The Court's refusal to allow appellant to examine its sole witness with regard as to how much material the witness purchased and contributed towards the insured building and whether he possessed any interest therein deprived appellant of showing that appellee possessed less than 100% interest in the insured building.

With relation to the personal property, appellee was permitted to recover for the interests of her married minor daughter; appellee had no insurable interest in said daughter's clothing.

ARGUMENT

1. THE COURT ERRED IN REFUSING TO ALLOW EXAMINATION OF SANCHEZ'S CONTRIBUTIONS TO THE REAL PROPERTY AND OWNERSHIP FOR APPELLEE EVEN ON A VALUED POLICY CAN RECOVER ONLY TO THE EXTENT OF HER INTEREST AND NOT THE FACE AMOUNT OF THE POLICY

An insured must possess an insurable interest in the property insured, and section 43328 of the Government Code of Guam so provides:

> "INSURABLE INTEREST.
>
> (a) Every interest in property or any relation thereto, or any liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured is an insurable interest . . .
>
> (c) If the insured has no insurable interest, the contract is void."

A partial interest in property does not entitle such an insured to recover for the destruction of the entire property. Sections 43352 and 43329 of the Government Code respectively read:

> "COVERAGE. When the name of the person intended to be insured is specified in a policy it can be applied only to his interest.
>
> MEASURE. Except in the case of property held by the insured as a carrier or depository,

the measure of an insurable interest in property is the extent to which the insured might be damnified by loss of, or injury to, the property."

The instant policy of fire insurance was issued in accordance with the two following Guam Government Code provisions:

"SECTION 43356. OPEN OR VALUED. A policy is either:

(a) An open policy which is one wherein the value of the subject matter is not agreed upon but is left to be ascertained in case of loss. An open policy shall not be written on real property for fire insurance or miscellaneous insurance.

(b) A valued policy which is one containing on its face an expressed agreement that the thing insured shall be valued at a specified sum."

"SECTION 43408. TOTAL LOSS BY FIRE OR MISCELLANEOUS INSURANCE: RECOVERY OF FULL AMOUNT.

A fire or miscellaneous insurance policy, in case of a total loss of any risk insured under the classes specified in this Title as fire or miscellaneous insurance shall be held and considered to be a liquidated demand against the insurer taking such risk for the full amount stated in such policy, or the full amount upon which the insurer charges, collects or receives a premium; provided the provisions of this article shall not apply to personal property."

In *Lighting Fixture Supply Co. v. Pacific Fire Ins. Co.* (1932), 176 La. 499, 146 So. 35, the Supreme Court of Louisiana had before it the problem of whether the

insured could recover the face amount of a valued policy of fire insurance where the insured's lease provided that the improvements to the real property were to become the lessor's upon the expiration of the lease. The valued policy law of Louisiana at the time provided:

> "Whenever any policy of insurance against loss of fire is hereafter written or renewed, on property immovable by nature and situated in this State, and the said property shall be either partially damaged or totally destroyed, without criminal fault on the part of the insured or his assigns, the value of the policy as assessed by the insurer or as by him permitted to be assessed at the time of the issuance of the policy, shall be conclusively taken to be the true value of the property at the time of the issuance of the policy and the true value of the property at the time of the damage or destruction. . . ." (La. Acts of 1900, No. 135.)

In holding that the insured was not entitled to recover the face amount of the policy, but only of its interest in the property the Court stated: "There is nothing in the valued policy law which prohibits the insurer from contesting the extent of the insurable interest of the insured in the immovable described in the policy. The statute presumes that the insured is the owner of the property insured, and merely prescribes a rule of public policy for establishing the pecuniary loss suffered by its partial or total destruction by fire . . .". (146 So. 38.) See also: *Lyles v. National Liberty Ins. Co.* (1938), 182 So. 181, 183.

In refusing to allow appellant to ascertain the extent of Sanchez's contributions to the building and to even question him as to ownership of the building deprived appellant of the opportunity of ascertaining the extent of appellee's insurable interest.

---

2. THE COURT'S REQUIREMENT THAT APPELLANT LAY A FOUNDATION FOR SANCHEZ TO TESTIFY WAS IN ERROR IN THAT THE FOUNDATION HAD BEEN LAID

In discussing the laying of a foundation Wigmore states:

> "The witness, before he refers to the matter in hand, must make it appear that he had the requisite opportunities to obtain correct impressions on the subject; and the first questions put to him should be and usually are directed to laying this foundation. . . ."
>
> 2 Wigmore on Evidence 758.

Sanchez had already testified to having lived with appellee for three years, to having worked on the construction of the house and to having purchased some of the materials that went into the construction of the house. (T. 71, 73.) It is difficult to comprehend what more of a foundation appellant could have laid, especially since Sanchez was being asked what *he* bought.

3. APPELLEE POSSESSED NO INSURABLE INTEREST IN HER MARRIED DAUGHTER'S CLOTHING

The Civil Code of Guam, section 202, reads:

> "The parent, as such, has no control over the property of the child."

And section 204 provides:

> "The authority of a parent ceases . . . (2) Upon the marriage of the child; . . ."

Such marriage of appellee's minor married daughter resulted in her emancipation. *Easterly v. Cook* (1934), 140 Cal. App. 115, 121, 35 P. 2d 164. Therefore, the value of this daughter's clothing must be excluded in determining whether the jury's verdict of $2,000 for appellee's personal property is supported by the evidence.

All the items of personal property testified to are contained in Plaintiff's Exhibit 3 (See T. pp. 26-30); excepting the clothing, pillow cases, bed sheets, bedspreads and towels, such amounts to only $1,600.00. In breaking down the $500.00 value of the last mentioned items, appellee testified such was composed of the following at the following figures: curtains $10 (T. 51); towels $24 (T. 51); bedspreads $39 (T. 47); sheets $25 (T. 47); pillow cases $15 (T. 47); appellee's new dresses $30.85 (T. 48); 12 older dresses, some costing more than $12.95 and some less (T. 48); appellee's shoes $30 (T. 49-50); baby's clothes $30 (T. 50). The total of these items specifically testified to amounts to only $203. Appellee did not establish the value of her other 12 dresses and she could not include

the value of her married daughter's 15 dresses. The evidence therefore does not support the jury's conclusion that appellee suffered a loss of $400 in personal property.

CONCLUSION

Appellant having been deprived of an opportunity of ascertaining the extent of appellee's interest in the real property, and the evidence not supporting the jury's verdict as to appellee's personal property loss, it is respectfully submitted that the judgment be reversed and a new trial ordered.

Dated, San Francisco, California,
February 5, 1962.

Respectfully submitted,
SCHOFIELD, HANSON, BRIDGETT,
MARCUS & JENKINS,
By WILLIAM R. EDGAR,
Attorneys for Appellant.

E. R. CRAIN,
Of Counsel.

(Appendix Follows.)

Appendix.

Appendix

	Received in Evidence
Plaintiff's Exhibit #1	13
#2	13
#3	54
Defendant's Exhibit A	65

No. 17,443

IN THE

United States Court of Appeals

For the Ninth Circuit

FRANK SOUZA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Hawaii in Criminal No. 11,530

BRIEF FOR APPELLEE

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No. 17,443

IN THE

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Appellant,

vs.

UNITED STATES OF AMERICA,
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On Appeal from the United States District Court for the District of Hawaii in Criminal No. 11,530

BRIEF FOR APPELLEE

JURISDICTIONAL STATEMENT

Appellee agrees with appellant's statement as to this Court's jurisdiction to hear this appeal, and as to the jurisdiction of the Court below.

STATEMENT OF THE CASE

Appellee agrees with appellant's statement of the case with the exception of appellant's paraphrasing of the testimony of Mr. Suemori (Tr. 108), (App. Br. 11), and the discussion as to the availability of the bolt-cutter to the defendant (App. Br. 13).

Mr. Suemori did not testify that the copper nickel tubing would *most* likely come from "Hawaiian Pine" or other plantations. He testified, rather, that if copper of that sort were to come to him as scrap, it would likely come from the plantations or the Navy. He was not testifying as to the specific origin of the copper nickel tubing in question.

With reference to the bolt-cutter's availability to the defendant, a discussion of the evidence in this regard is found in Part V-B of the argument.

ARGUMENT

I

THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AND THE WRITTEN MOTION FOR A JUDGMENT OF ACQUITTAL OR A NEW TRIAL AS THE LATTER RELATED TO THE SUFFICIENCY OF THE INFORMATION.

A. By not making timely objections, appellant has waived any alleged error in the information.

Objections to any defects the appellant urges are to be found in the information have been clearly waived. Appellant complains that the information is not sufficient after he has waived indictment in the District Court and consented to be charged by information. No motion was made objecting to the information or stating a defense to the charge. When, with appellant's consent, the information was amended for another purpose, the alleged defect was not brought to the Court's attention (Tr. A).

Rule 12 of the Federal Rules of Criminal Procedure states that defenses and objections other than objections that the information fails to show jurisdiction or charge an offense must be raised by motion before trial. No such motion was made by the appellant in the case at bar.

Appellant's opening brief (App. Br. 24-26) cites *United States v. Carll,* 105 U.S. 611 (1881); *Ornelas v. United States,* 236 F.2d 392 (C.A. 9th, 1956); *Lowenburg v. United States,* 156 F.2d 22 (C.A. 10th, 1946); *Meer v. United States,* 235 F.2d 65 (C.A. 10th, 1956); *Sutton v. United States,* 157 F.2d 661 (C.A. 5th, 1946); *United States v. McCulloch* (N.D. Ind. 1947), 6 F.R.D. 559; and *United States v. Tornabene,* 222 F.2d 875 (C.A. 3d 1955), as authority for holding insufficient the charges laid in an indictment or information. All of these cases except the *Sutton* and the *Carll* cases involve an appeal from a district court judge's overruling a timely objection to the formal charge.

Had an objection to the information been made, and if the district judge overruled such an objection and if such ruling had been erroneous, most of the cases cited by the appellant might be in point. Since no such objection was made, appellant relies on the *Sutton* and *Carll* cases only.

The *Sutton* case is not in point as (1) criminal intent was not involved and (2) the defect was an ambiguity as to which of two administrative regulations was violated. Likewise, in the *Carll* case, the omission was an extrinsic fact rather than criminal intent.

The *Sutton* and *Carll* cases will be discussed in Parts I-B and I-D, respectively, *infra.*

Appellant before the trial had ample opportunity to raise objections and defenses. The original information was filed on December 2, 1960 (R. 3) and the amended information was filed on January 1, 1961 (R. 6). All defenses and objections not raised before trial are, therefore, waived. *United States v. Visconti,* 261 F.2d 215 (2 Cir. 1958); *United States v. McDonald,* 293 F. 433 (D.C. Minn. 1923); *Soper v. United States,* 220 F.2d 158 (9 Cir. 1955), cert. denied 350 U.S. 828.

Defects that can be waived include the omission of an allegation of criminal intent. In *United States v. Sherman Auto Corp.,* 162 F.2d 564 (C.A. 2d, 1947), the defendants were charged and convicted under a statute declaring it unlawful for any person to sell commodities in violation of certain price regulations. The Court there found that no crime in fact was committed if the statute was not wilfully violated and that no count in the information contained the word "wilful". The Court, after stating that no objection was timely made, held that the defendants had waived any error. Similarly, in *Finn v. United States,* 256 F.2d 304 (4 Cir. 1958), it was held that where the term "knowingly" and "wilfully" were found in the statute and omitted in the information, any defect thereby is waived if not brought to the Court's attention by a proper motion or objection. Also in *United States v. Sawyers,* 186 F.Supp. 264 (N.D. Cal. 1960), the Court ruled that the defendant waived the fact that the existence of criminal intent was not alleged in the indictment by not properly objecting to it.

A further point indicating the appellant's lack of standing to complain of the formal charge is that this charge is laid in an information rather than an indictment. Rule 7 of the Federal Rules of Criminal Procedure provides in subsection (e):

> "The Court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."

This has a further bearing on the appellant's waiver of any alleged defect. The defendant could have had the charge amended if he felt the genuine need of enlightenment. *United States v. Elade Realty Corp.,* 157 F.2d 979 (2 Cir. 1946).

The fact that the formal charge is laid in an information rather than an indictment was also considered in *Finn v. United States, supra.* Although the Court found that it could get to the merits of the case in spite of the fact that the defendant did not make the timely objection, it said:

> ". . . The fact that he delayed raising the objection until it was too late to cure it by a simple amendment, may be a consideration in judging the information's sufficiency." (p. 307.)

Also in *United States v. Sherman Auto Corp., supra,* the appellants contended that the salesmen made innocent mistakes as to the ceiling prices of the cars sold. The Court said that the jury was charged so that the salesmen could only be convicted if they wilfully sold automobiles in excess of the ceiling prices and added that at no time during the trial, or after the

verdict, did the appellants raise any objection to the failure of the information to allege that the charged violations were wilful. The Court further stated that had they done so, the information could have been amended and that under these circumstances, the error, if any, in the formal statement of the charges did not survive the verdict.

B. Regardless of the wording of the information, appellant was not prejudiced.

An indictment or information is required to (1) sufficiently apprise the defendant of what he must be prepared to meet and (2) show with accuracy to what extent he may plead a former acquittal or conviction. *United States v. Debrow,* 346 U.S. 374 (1953). The appellant to complain must allege some prejudice in accordance with these two requirements. *United States v. Davis,* 272 F.2d 149, 150 (7 Cir. 1959).

Regardless of the particular wording of the information in the case at bar, or a consideration as to an alternative manner in which the information could have been worded, appellant below was not prejudiced.

In *Sutton v. United States, supra,* cited by the appellant, the Court found the actual prejudice which the defendant was subject to. In holding the information bad, the Court stated that there were a number of violations in the regulations cited in the information and the record would not sustain a plea of former jeopardy as to any such violations. No such defect appears in the information in the case at bar as the defendant was charged with violating a statute which the defendant himself urges charges but one offense (App.

Br. 26). Appellant does not urge, nor does there exist any situation in which the defendant can be charged again for the same crime charged in the present information.

Was the defendant apprised of what he had to meet upon trial? The record shows that the defendant did not object or present a defense to the information prior to trial. This evidences his satisfaction with it. Further, in defense counsel's opening statement, he said:

> "Mr. Howell. Ladies and gentlemen, I represent the Defendant Frank Souza. The issues in this case are simple, as Mr. Dudley has pointed out.
>
> Mr. Souza denies taking the property in question. He admits selling it to various scrap iron dealers, but he denies that he took it from the U.S. Navy or stole it. *He came in the possession of this property honestly and without any knowledge that this property belonged to the United States Government. We intend to prove that,* and at the end of the case we will ask you for an acquittal on all counts. Thank you." (Emphasis added, Tr. 4.)

The record discloses (Tr. 171-183) that the defendant attempted to explain the manner in which he obtained possession of the copper tubing and in essence claimed that he had received it in good faith not knowing it was stolen or the property of the United States. Although the closing arguments of counsel are not set out in the transcript, there is nothing to indicate that the appellant below did not have an opportunity to argue his defense and to convince the jury of its ef-

ficacy. On proper instructions (Tr. 207, 208) relative to the proof required in regard to criminal intent, the jury found the defendant guilty.

C. Count I of the information supplied a sufficient allegation of criminal intent if such is deemed needed with respect to Counts II, III and IV.

Count I of the information sufficiently alleged criminal intent for the remaining counts. An indictment or information must be considered as a whole. *Carlson v. United States,* 249 F.2d 85, 88 (10 Cir. 1957). In *Dunbar v. United States,* 156 U.S. 185, 192 (1895), the Supreme Court of the United States considered the specific issue urged by the appellant in the case at bar. After considering *United States v. Carll, supra,* the Court stated:

> "A second objection, which is made to all of these counts * * * is that a *scienter* is not alleged. But one good count is sufficient to sustain the judgment. . . ."

In *Hudspeth v. United States,* 183 F.2d 68 (C.A. 6th, 1950), the Sixth Circuit ruled in a similar manner. There, the ground for appeal was that the second count of the indictment failed to allege criminal intent. The Court there held that since the statute (18 U.S.C. 2113) described but a single offense, both counts must be read together. The appellant here urges that the statute in question in the case at bar (18 U.S.C. 641) states but one offense (App. Br. 26); with this the appellee concurs.

Count I of the amended information charges that the defendant "did unlawfully steal" (R. 7). It is

urged that by the authority of the *Hudspeth* case and the *Dunbar* case, Count I of the information in the case at bar suffices for an allegation of criminal intent. See also *United States v. Sawyers, supra.*

D. Counts II, III and IV of the information standing alone are sufficient.

Appellant in his opening brief relies heavily on *Morissette v. United States,* 342 U.S. 246 (1952) and *United States v. Carll, supra.* It is admitted that the *Morissette* case is a correct statement of the law and applicable to the case at bar and that the *Carll* case decided in 1881 has been superseded by the Federal Rules of Criminal Procedure and has been distinguished by later cases so that it is not in point.

1. The Morissette case.

Appellant correctly states the facts in the *Morissette* case. However, the rules as laid down therein does not support appellant's contentions in the case at bar. The *Morissette* case does not concern indictments or information. When considered in the lower court, *Morissette v. United States,* 187 F.2d 427, 429 (C.A. 6th, 1951), the Sixth Circuit touched upon and refused two of the defendant's contentions. The defendant in that case urged (1) that the indictment is required to allege felonious intent and (2) the proof adduced at trial must show felonious intent. As to the first contention, the Sixth Circuit stated:

> "As to the indictment, the federal courts long ago abandoned the course of reversing convictions for crime on technical niceties of pleading. An indict-

> ment is sufficient which fairly apprises the defendant of the charge which he is to meet and enables him to prepare his defense and, after trial, to stand against double jeopardy on a plea of former acquittal or former conviction. This Court has frequently stated the principle."

On appeal, the United States Supreme Court had two specifications of error to consider: (1) with reference to the indictment and (2) with reference to the proof required. The Supreme Court in that case did not overrule the Sixth Circuit's holding with reference to the indictment but rather by a clear implication stated that the rule was correct. The Supreme Court concluded by saying:

> "Of course, the jury, considering Morissette's awareness that these casings were on government property, his failure to seek any permission for their removal and his self-interest as a witness, might have disbelieved his profession of innocent intent and concluded that his assertion of a belief that the casings were abandoned was an afterthought. *Had the jury convicted on proper instructions, it would be the end of the matter.* * * * They might have concluded that the heaps of spent casings left in the hinterland to rust away presented an appearance of unwanted and abandoned junk . . ." (Emphasis added.) *Morissette v. United States,* 342 U.S. 246, 276 (1952).

Thus, it is seen by reference to appellant's principal authority that the United States Supreme Court would have affirmed the conviction had the jury been properly instructed. In the case at bar, the jury was properly instructed (Part III, *infra*).

In a later Sixth Circuit case, *Logsdon v. United States,* 253 F.2d 12 (6 Cir. 1958), a court had again before it the same issue as passed upon by the Supreme Court in the *Morissette* case. In *Logsdon* the defendant was charged with wilfully misapplying funds of an insured bank. The defendant urged that the indictment, following the words of the statute, did not sufficiently charge a criminal intent to defraud. The Court held that the government, at the trial, would be required to prove felonious intent and stated:

> "Since the ruling involved only the wording of the indictment, it in no way impairs the necessity of proof by the government of criminal intent on the part of the appellant. *Morissette v. United States,* 342 U.S. 246, 264, 274 . . ."

The Tenth Circuit in *Capehart v. United States,* 244 F.2d 74 (10 Cir. 1957), cert. denied 354 U.S. 924, held, in a similar manner, that the failure to allege felonious intent does not make an information defective.

2. The Carll case.

The holding in the *Carll* case as set out in the appellant's opening brief does not apply to the case at bar, and cases decided subsequent thereto indicate that it no longer states the applicable rule of law.

Cannon v. United States, 116 U.S. 55, 79 (1885) (vacated because of lack of jurisdiction, 118 U.S. 355), decided shortly after the *Carll* case, shows that it has limited applicability. There, the Court held:

> "The omitted allegation in that case [*Carll*]—a knowledge of the forgery—was a separate ex-

> trinsic fact, not forming part of the intent to defraud, or of the uttering, or of the fact of forgery; and, in the absence of that allegation, it was held that no crime was charged."

The *Carll* case rule, then, does not apply to criminal intent.

In *United States v. Atkinson,* 34 F. 316 (E.D. Mich. 1888), it was again held that the omission in the *Carll* case was that of a distinct fact which was necessary to be proven and states further that the rule is different where fraudulent intent is to be presumed from the act done.

This Honorable Court in *McKinney v. United States,* 172 F.2d 781, 782 (9 Cir. 1949), has itself considered the *Carll* case. In that case the appellant relied upon *United States v. Carll, supra,* and in affirming the lower court's decision, this Court said:

> "As to United States v. Carll, *supra,* the government urges that such case was decided in 1882 and that the offense under the statute then under consideration was similar to the common law offense of uttering a forged or counterfeit bill while the offenses of possession in the instant case are purely statutory."

The Supreme Court again in 1957 distinguished the *Carll* case in *United States v. Turley,* 352 U.S. 407 (1957). The Court in that case stated that the *Carll* case involved an interpretation of a common law word and offense. Also, a very recent authority, *Harris v. United States,* 288 F.2d 790 (8 Cir. 1961), in passing upon facts similar to those in the *Carll* case, held:

> "The Federal Rules of Criminal Procedure have been adopted since the decision of the Carll case. Such rules were designed 'to eliminate technicalities in criminal pleading and are to be construed to secure simplicity in procedure.' United States v. Debrow, 346 U.S. 374, 376 * * *."

In light of more recent decisions, *United States v. Carll,* 105 U.S. 611 (1881), is not controlling for the case at bar.

3. Good faith defense.

It is not urged that a conclusive presumption of guilt arises when a person is proved to have been in possession of stolen goods. It is urged, however, that good faith is a defense to be asserted by a defendant and negated by the government beyond a reasonable doubt. It need not be alleged in the information. With regard to such a requirement, the United States Supreme Court in 1893 stated in *Evans v. United States,* 153 U.S. 584, 594, 595:

> "Such evidence [of criminal intent] may, however, be manifested by so many acts upon the part of the accused, covering such a long period of time, as to render it difficult, if not wholly impracticable, to aver, with any degree of certainty, all the essential facts from which it may be fairly inferred. . . . 'This means of effecting the criminal intent,' says Mr. Wharton, 'or the circumstances evincive of the design with which the act was done, are considered to be matters of evidence to go to the jury to demonstrate the intent, and not necessary to be incorporated in the indictment.'" 1 Wharton's Criminal Law, Section 292.

In *United States v. Allison,* 191 F.Supp. 443 (N.D. Cal. 1960), affirmed in *Beavers v. United States,* 287 F.2d 827 (9 Cir. 1961), it was held that it is not necessary for an indictment to anticipate every possible defense based on authorization and to deny each and every one of these defenses prior to their being raised.

4. Requirement of indictments and informations.

The present rule on the sufficiency of indictments was stated in *Hagner v. United States,* 285 U.S. 427, 431 (1932). With reference to the former practice, it was said:

> "The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' "

Again in 1953 in *United States v. Debrow,* 346 U.S. 374, 376, cited by the appellant, the Supreme Court ruled:

> "The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged,

> 'and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' "

In that case, the trial judge sustained a motion to dismiss and the ruling was upheld by the Court of Appeals. The Supreme Court reversed and held that the indictment was sufficient, stating that the Federal Rules of Criminal Procedure were designed to eliminate technicalities in criminal pleading and are to be construed to secure simplicity in procedure. See also *United States v. Sherman Auto Corp., supra.*

The sufficiency of an indictment should be judged by practical and not by technical considerations. It is nothing but the formal charge upon which the accused is brought to trial and if it fairly informs the accused of the charge which he is required to meet and avoids the danger of being prosecuted again, it is sufficient. *Harris v. United States, supra; Blum v. United States,* 46 F.2d 850 (6 Cir. 1931). The defendant is entitled to a formal and substantial statement of the grounds upon which he is questioned, but not to such strictness in averment as might defeat the ends of justice. *Evans v. United States, supra; Dowling Brothers Distilling Co. v. United States,* 153 F.2d 353 (6 Cir. 1946).

Subsequent to the *Carll* case, numerous courts have passed upon the sufficiency of an indictment where criminal intent, felonious intent, wilfulness, and un-

lawfulness have been alleged not to be sufficiently pleaded. In *United States v. Sawyers, supra,* the defendant was charged with (1) stealing certain logs belonging to the United States, (2) having unlawfully cut certain timber growing on public lands of the United States, and (3) unlawfully removing some of the timber which was so cut. The defendant in that case claimed that the latter two charges should be dismissed because they did not allege the existence of criminal intent. The district judge in the California case, without commenting on the word "unlawful," held that the indictment was sufficient and that it was not necessary for it to negate good faith.

In *United States v. Sherman Auto Corp., supra,* and *United States v. Elade Realty Corp., supra,* the defendants were charged with selling certain property at prices higher than the then ceiling price. In both cases, the defendants urged that the formal charge did not set out criminal intent and that the defendants might be convicted for a good-faith transaction. In both cases, the respective courts held that the indictment was in fact sufficient. See also *Evans v. United States, supra.*

Other cases indicating the liberality employed by Courts of Appeals in reviewing cases where similar error was urged are *Robertson v. United States,* 168 F.2d 294 (5 Cir. 1948), (where against the charge of transportation in interstate commerce of a stolen automobile, it was not error to fail to allege that the vehicle was in fact stolen); *Finn v. United States, supra,* (where the failure to use the words "know-

ingly'' and ''wilfully'' was held not to be error); and *Schmidt v. United States,* 286 F.2d 11 (5 Cir. 1961), (where on a conviction for Federal bank robbery, it was held that an indictment not containing the word ''unlawful'' was sufficient).

The information in the case at bar meets the test for formal charges. It sets out facts in simple language informing the defendant of what he must meet at the trial and is sufficient to bar a subsequent prosecution.

II.

THE DISTRICT COURT PROPERLY DENIED APPELLANT'S WRITTEN MOTION FOR A JUDGMENT OF ACQUITTAL AS IT RELATED TO THE SUFFICIENCY OF THE EVIDENCE.

A. Inconsistency of verdicts.

Defendant in his opening brief (App. Br. 31), states that inconsistency of verdicts is not a ground for reversal. After correctly stating the law in this regard, appellant proceeds to argue contrary to this correct legal doctrine on facts not supported by the evidence. Appellant states that the whole theory of the government is that the defendant both stole, as charged in Count I, and sold, as charged in the remaining counts, the copper tubing in question. Assuming, for the sake of argument, that such is the case, it is immaterial.

In *Dunn v. United States,* 284 U.S. 390, cited by the appellant, the defendant was charged on a three-count indictment, charging *first,* maintaining a com-

mon nuisance by keeping for sale intoxicating liquor; *second,* for unlawful possession of intoxicating liquor; and *third,* for unlawful sale of such liquor. The jury acquitted the defendant on the second and third counts but found him guilty as to the first.

The *Dunn* case raises the same sort of difficulties and would give rise to the same arguments offered by appellant in the case at bar in that *query:* How could the defendant not possess liquor and not sell liquor yet keep a common nuisance based on the prior two facts? Hence, in the case at bar, the appellant cannot rely on a logical inference which is contrary to law and the facts.

The appellant states that the government's theory is that the defendant *alone* executed the theft of the property. There is nothing in the record that supports this statement. The indictment does not state that the defendant *alone* committed the acts charged and nothing in the record so indicates.

B. Sufficiency of evidence.

When reviewing a criminal proceeding which has resulted in a conviction, a court is required to take that view of the evidence most favorable to the government. *Glasser v. United States,* 315 U.S. 60 (1942); *Wright v. United States,* 159 F.2d 8, 9 (8 Cir. 1947); *Schino v. United States,* 209 F.2d 67 (9 Cir. 1953), cert. denied 74 S.Ct. 627. An appellate court in reviewing the sufficiency of the evidence is limited to the consideration of whether there was some competent and substantial evidence. *Banks v. United*

States, 147 F.2d 628, 629 (9 Cir. 1945); *Stillman v. United States,* 177 F.2d 607, 616 (9 Cir. 1949).

The government's case starts with the inference that possession of the stolen property itself raises an inference of guilt. Hence, the defendant's admitted possession and sale of the copper tubing raises an inference which the jury might well have accepted; namely, that the defendant knew of the stolen character of the property and feloniously converted it. In *Morandy v. United States,* 170 F.2d 5 (9 Cir. 1948), cert. denied 336 U.S. 938, the defendant was convicted of transporting a stolen automobile across state lines. The Court acknowledged that the possession of the stolen property in one state raises no presumption that the possessor transported it in interstate commerce, but added:

> "The law is that the possession of the fruits of a crime recently after its commission,—namely, here, the automobile, in the absence of an explanation justifying the possession, warrants an *inference* pointing towards guilt."

This case appears to be in point as the inference is not used to show that the defendant had in fact stolen the automobile but that he transported it in interstate commerce. The same inference was available in the case at bar as the admitted possession of the copper tubing inferred to the jury that the defendant had guilty knowledge of its stolen character when he sold it.

Further evidence was offered in the case at bar by the testimony of Special Agent of the Federal Bureau

of Investigation Sterling Adams (Tr. 155, 156). He testified that upon interview with the defendant on October 11 and 12 of 1960, the defendant denied any knowledge of the stolen copper tubing (Tr. 151, 152). Adams further testified (Tr. 154, 155) that on October 24, 1960, the defendant was again interviewed by him and denied any knowledge of the tubing after being exhibited a sample of it. Then, Adams confronted the defendant with the fact that the FBI had knowledge that he had sold a quantity of tubing. Thereupon, defendant admitted some knowledge of the tubing, but stated that this was the only tubing he had sold.

Adams then confronted the defendant with the fact that the FBI had knowledge that he had sold a second quantity of tubing and, in a like manner, defendant admitted that he had knowledge of the second sale. Evidence of false statements made to the FBI in an attempt to conceal facts can be considered by the jury in coming to its conclusion. *Swartz v. United States,* 207 F.2d 727 (9 Cir. 1953), (discussion in the concurring opinion of Judge Pope).

Testimony was given that the area from which the tubing was stolen was not easily accessible and that security measures were used. Further testimony (Tr. 78) shows that the defendant did, in fact, have access to the area where the tubing was stored. These two facts, considered with all the evidence, are consistent with the jury's finding that the defendant had guilty knowledge when he sold the tubing.

Sterling Adams again testified (Tr. 155) as to the defendant's explanation of where he obtained the cop-

per tubing. His explanation was that he bought it from "some boys" and after further questioning, the defendant changed his story and said he bought it from a "Portuguese man" about whom he couldn't describe age, height or weight or give any kind of description. Defendant's illogical and inconsistent explanation of his possession are again additional facts indicating the guilt of the defendant. There is a logical inference that a person in possession of property knows where it came from and can identify the person from whom he obtained possession. The fact that the property belonged to the United States and was, in fact, stolen raises an inference for the jury that the defendant had guilty knowledge.

The defendant, after he was caught lying, made still another incriminating remark in the presence of Adams. He said, (Tr. 156) "I prefer to say no more about it because I know I am wrong, eh?"

When he took the stand, the defendant gave further testimony, both on direct and cross, which indicated his guilt. He testified as to his method of computing his income tax. He gave the incredible story that he listed his gross sales as his taxable income, stating that he would only list the amount of money received from scrap iron and would not deduct the cost of obtaining the scrap iron. This testimony might indicate that the defendant is truly ignorant but the most logical inference in light of his prior business experience (Tr. 174), is that the defendant, indeed, had no expenses in obtaining the property or that the listing of such expenses would incriminate him.

On further cross examination, the defendant told a story inconsistent with what he had told Special Agent Adams with regard to the person from whom he purchased the property. In response to Mr. Dudley's question (Tr. 175), he testified that he bought the property from someone called "Blackie." This was the third story he had told in this regard, the first being that he purchased it from boys and the second being that he had purchased it from a Portuguese man.

The defendant's possession of stolen property, testimony of his inconsistent and illogical explanation of such and other testimony which indicates a course of conduct consistent and logical with guilt rather than innocence provide substantial evidence upon which a jury found the defendant guilty.

III.

THE DISTRICT COURT DID NOT ERR IN FAILING TO GIVE DEFENDANT'S INSTRUCTION NO. 3.

A. Appellant has both waived objections to the instructions and has specifically acknowledged the fact that the jury was properly instructed.

Any objection the appellant might have to the instructions given to the jury has been clearly waived. Such an assignment of error, even if complained of in appellant's motion for a judgment of acquittal or for a new trial filed on February 7, 1961 (R. 10) would not have and could not have been considered. *United States v. Butch,* 164 F.Supp. 678 (E.D. Pa.

1958). Appellant, in response to the Court's inquiry as to whether there were any exceptions to the charge, replied that there were none (Tr. 220). In failing to object at the time, he may not now assign the omissions as error.

Appellant did not assign this omission as error in his motion for a judgment of acquittal or for a new trial made on February 7, 1961, but rather *specifically acknowledged that the Court properly instructed the jury that knowledge of the ownership and theft of the property sold or conveyed was required in order to convict* (R. 12).

Appellant, now, for the first time in his opening brief, after having conceded that the jury was properly instructed, assigns error to the trial judge's failure to give defendant's requested instruction No. 3. Under Rule 30, Federal Rules of Criminal Procedure, appellant cannot now complain. *Fowler v. United States,* 234 F.2d 695 (5 Cir. 1956).

Nothing in the requested instruction as compared to the instruction given appears to be unique so as to affect a substantial right of the defendant within the purview of Rule 52, Federal Rules of Criminal Procedure.

B. Court's instruction fully covered defendant's requested instruction No. 3 so that there is no error in the charge to the jury.

Appellant refers to the applicable Court's instruction as if it were given in two separate and distinct portions. The instruction reads:

"Now, the elements of the offenses charged in each of Counts 2, 3 and 4 are applicable to each and they are as follows: *First,* that on or about the dates charged the Defendant did sell and convey the property referred to in Counts 2, 3 and 4; *second,* that at the time of the selling the property belonged to the United States or an agency thereof; and, *third,* that when the Defendant sold the property, he had the specific intent to sell the property without lawful authority, *knowing it was property owned by and stolen from the United States;* and, *fourth,* that the property sold was of a value in excess of $100. I have previously told you what the definition of value is, namely, face value, par value, market value, cost, retail or wholesale, whichever one is the greater for the purpose of this statute. Now, if you find that *these four elements,* namely, selling and conveying of property owned by the United States, the selling being by the Defendant with specific intent to sell property without lawful authority, which property he knew was property of the United States or an agency thereof, and that this property was of a value greater than $100, if each and all of those are established beyond a reasonable doubt, then it is your duty to convict as to any count or counts to which you so find. On the other hand, if any one or more of these elements is not so established, then it is equally your duty to acquit the Defendant as to such count or counts as you may so find." (Emphasis added, Tr. 207, 208.)

In instructing the jury, the Court stated: "Now, if you find that these four elements . . . ." (Tr. 208, line 6). Appellant urges that the portion of the in-

struction following this line is defective but ignores, however, the obvious antecedent of the expression "these four elements." The antecedent is clear and the third of these elements is, "knowing it was property owned by and stolen from the United States." There is no other possible interpretation of this instruction.

Appellant cannot complain of a requested instruction not given if the jury was otherwise adequately instructed. This principle applies to the intent necessary to warrant a conviction. *Lee v. United States,* 238 F.2d 341 (9 Cir. 1956).

Appellant cites *Yates v. United States,* 354 U.S. 298 (1957). The facts in the *Yates* case are clearly distinguishable from the facts of the case at bar. Under the Smith Act, the defendant must both organize and advocate to be held criminally liable. The Court held in the *Yates* case that portions of the trial court's instructions were not sufficiently clear or specific to warrant an inference that the jury understood it must find the defendant guilty of both "organizing" and "advocating." In the case at bar, the defendant must not have only sold without authority but must have had knowledge that the property belonged to the United States and was stolen. The jury was clearly instructed in this regard (Tr. 207, 208).

IV.

THE DISTRICT COURT DID NOT ERR IN GIVING A COPY OF THE AMENDED INFORMATION TO THE JURY.

A. By not objecting, appellant has waived any error with regard to the jury's having with it a copy of the amended information.

Appellant acknowledges the fact that no objection was made (App. Br. 20). The effect of such an omission is elementary. In United States courts, defendants are privileged to waive even very substantial rights. *Haskins v. United States,* 163 F.2d 766 (C.A.D.C. 1947). The error assigned here, even if well founded, is by no means substantial. It is sufficient to say that there is no error because nothing was brought to the attention of the trial judge. *Troutman v. United States,* 100 F.2d 628 (10 Cir. 1938).

B. The District Court did not abuse its discretion by allowing the jury to have a copy of the amended information.

A trial judge has discretion as to whether a copy of the indictment or information shall be given to the jury to carry into the jury room, and if properly instructed, this is not error. *C.I.T. Corp. v. United States,* 150 F.2d 85 (9 Cir. 1945); *Shayne v. United States,* 255 F.2d 739, cert. denied 358 U.S. 823. The jury was properly and fully instructed that the information was not to be considered as evidence and its only function was to state specifically the charges that were to be considered against the defendant (Tr. 201).

In order to accept appellant's contentions, we must conclude (1) information was defective, (2) the jury

was not properly instructed as to the requirement of intent and knowledge or that the jury disregarded the Court's instructions as to intent and knowledge, and (3) that the jury disregarded the Court's instructions relevant to the use of the information (Tr. 201). The sufficiency of the information has been discussed in Part I of this argument and the sufficiency of the Court's instruction in Part III.

A court of appeals cannot consider the possibility that the jury acted contrary to the specific and clear instructions of the trial court but rather must assume that the jury acted in accordance therewith based on some evidence to support its findings. *Glasser v. United States, supra.*

V.

THE DISTRICT COURT PROPERLY ADMITTED EXHIBIT 12 INTO EVIDENCE.

A. A proper and complete objection to Exhibit 12 was not made.

Where exhibits are provisionally admitted into evidence, the responsibility is given to the party resisting its introduction to make a motion to strike if he is not satisfied that the evidence has been properly connected to the defendant or the foundation completed and to request the Court to instruct the jury to disregard the exhibit. *United States v. Molzahn,* 135 F.2d 92 (2 Cir. 1943), cert. denied 319 U.S. 774; *Franano v. United States,* 277 F.2d 511 (8 Cir. 1960), cert. denied 364 U.S. 828 (1960). Appellant has not perfected his objection to the admission of Plaintiff's

Exhibit No. 12 into evidence. It was admitted with the understanding that further evidence would be offered relating to it. The District Court had no way of knowing whether the appellant was satisfied with the subsequent evidence and, therefore, no error can be assigned.

Appellant in the trial below had numerous occasions to so move. Immediately after its introduction into evidence, it was withdrawn with the consent of both parties (Tr. 147). Hence, the exhibit was no longer before the jury which, itself, negates the effect it had upon the jury. The defendant at that time did not move to strike nor did he request the judge to admonish the jury to disregard the exhibit. Further, the appellant does not assign as error a refusal to give an appropriate instruction submitted to the trial judge if such an instruction was submitted. Finally, appellant did not object to the instructions as given by the trial judge (Tr. 220).

Any error with respect to Exhibit 12 has been waived on the additional ground that appellant does not here assign error to the introduction into evidence of Exhibit 13.

Both of these exhibits were introduced to show that the defendant had access to a tool (Exhibit 12) which made marks on a length of tubing cut for experimental purposes (Exhibit 13) similar to those on the tubing identified in the information (Exhibit 10). Surely, then, if no error is specified with regard to Plaintiff's Exhibit 13, there can be no error in admitting Plain-

tiff's Exhibit 12, which is just a means by which Plaintiff's Exhibit 13 was admitted.

B. A sufficient foundation was laid for the introduction of Exhibit No. 12.

Jackson Kawewehi testified that Exhibit No. 12 was identical with the bolt-cutter that was issued to Clarence Castro on December 29, 1959, which at that time was unaccounted for (Tr. 142, 143, 144). Castro himself testified that he kept the bolt-cutter on the truck assigned to him for the performance of his duties. Evidence was adduced from various sources showing that Souza worked constantly with Castro (Tr. 85, 87, 89, 90, 135, 152).

Seu Fong Mau testified that Souza at all times worked with either himself or Clarence Castro. In addition, the defendant himself stated to Special Agent of the Federal Bureau of Investigation Sterling Adams (Tr. 152) in response to a question regarding his (Souza's) truck, that on August 10, 1960, he had worked with Clarence Castro.

Admittedly, there appears no affirmative statement which places the defendant in the truck of Clarence Castro at one precise moment. However, it is undisputed that Castro worked continuously with Souza, and since trucks were used in their work, the evidence very clearly indicates that the defendant had worked with Castro while Castro drove his (Castro's) truck. It is clear, then, from the evidence as a whole that the defendant had available to him the tools of Clarence Castro.

It is not necessary in laying a foundation for an exhibit to prove that the defendant had actual possession of the item offered in evidence. Tools used in the perpetration of a crime can be introduced for illustrative purposes. *Sanders v. United States,* 238 F.2d 145 (10 Cir. 1956). In the *Sanders* case, the government offered into evidence a crowbar which was admittedly not connected to the defendant. It was offered solely on the testimony of an expert that such an instrumentality was probably used in the crime and the testimony of another witness that the defendant had attempted to obtain such an instrument.

Similarly, in *White v. United States,* 200 F.2d 509 (5 Cir. 1952), the Court permitted into evidence burglary tools and gloves which were found hidden 1,050 feet from a trailer occupied by the defendant as his residence. In that case, no evidence was offered to show that the tools and gloves actually belonged to the defendant. The Fifth Circuit in reviewing the judge's discretion stated that the jury had a right to infer that the tools were such as could have been used to effect the entry into the building. See also *United States v. Bazzell,* 187 F.2d 878 (7 Cir. 1951); *Morton v. United States, supra;* and *United States v. Lagow,* 66 F.Supp. 738, 740 (D.C.N.Y. 1946), Aff. 159 F.2d 245, cert. denied 331 U.S. 858.

Judge Holtzoff in the *Lagow* case stated that:

> "Evidence to be admissible does not have to be conclusive. All that is necessary is that it have a reasonable tendency to support the ultimate fact."

In that case, the defendant was charged with selling automobiles above the ceiling set by the Emergency Price Control Act. The Court admitted into evidence currency found on the person of the defendant. The money actually paid to the defendant was marked but fifteen minutes after the transfer of the money, the defendant was arrested and had in his possession an equal amount but in different, unmarked currency. It was held that the circumstances of the money being found had some tendency to show the ultimate fact of the sale even though it admittedly was not the actual currency paid.

In the case at bar, the evidence shows that Souza had available to him the bolt-cutter in Castro's possession. The record shows that the jury had submitted to it some of the tubing identified in the information and recovered from the scrap dealers to whom it was sold (Tr. 128) and a sample piece of tubing cut by the bolt-cutter admitted as Exhibit No. 12. The jury, then, could conclude that the same type of bolt-cutter was used to cut the two lengths submitted to them. By the standard of the *Lagow* case, this clearly has probative value. Although there is no eyewitness who saw the defendant with the bolt-cutter in his possession, evidence of its availability to the defendant and its employment in carrying out the crime provide a sufficient foundation for its introduction into evidence. *White v. United States, supra.*

C. The admission of Plaintiff's Exhibit 12, if error, was harmless error.

Appellant does not urge the manner in which the defendant was prejudiced by the introduction of the bolt-cutter into evidence. Certainly, it did not incite the passion of the jury and if not proper, it would be only irrelevant. The jury heard from the various witnesses how closely the defendant was linked to the bolt-cutter. If, indeed, it was irrelevant, then the jury might well have disregarded it rather than have considered it.

The record, without the bolt-cutter, clearly shows the guilt of the defendant (Part II, *supra*). Where the record otherwise satisfies a verdict of guilty, the introduction of needless evidence is not reversible error. *Guy v. United States,* 107 F.2d 288 (C.A.D.C. 1939).

CONCLUSION

This appeal fails to show any grounds sufficient for reversal.

Dated, Honolulu, Hawaii,
January 12, 1962.

Respectfully submitted,

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No. 17,446

United States Court of Appeals

For the Ninth Circuit

National Union Fire Insurance Co.,	*Appellant,*
vs.	
Luisa Santos,	*Appellee.*

Appeal from Final Judgment of the District Court of Guam Civil No. 32-60

CLOSING BRIEF OF APPELLANT NATIONAL UNION FIRE INSURANCE COMPANY

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Appeal from Final Judgment of the District Court of Guam Civil No. 32-60

CLOSING BRIEF OF APPELLANT NATIONAL UNION FIRE INSURANCE COMPANY

I. REFUSAL TO ALLOW APPELLANT TO EXAMINE ITS SOLE WITNESS AS TO THE EXTENT OF HIS INTEREST IN THE PROPERTY INSURED AND DESTROYED CONSTITUTED REVERSIBLE ERROR

Appellee seeks to sustain the decision below by utilizing a bootstrap argument; paraphrasing the Court below appellee inserts Government Code, Section 43408 and Arkansas Code, Section 66-515 into the following statement of the trial Court herein:

> "Government Code of Guam §43407 was adopted without substantial change from an Arkansas statute, Ark. Stats. §66-514, and for that reason Arkansas decisions construing *that* Arkansas statute are persuasive . . ." (Emphasis added, T. 9.)

The Court below not only fails to refer to Government Code, Section 43408, with which we are concerned, but it fails to cite any supporting authority for the proposition that Section *43407* was adopted from the State of Arkansas; moreover appellant's research fails to reveal any legislative history as to Sections 43408, *or* 43407 of the Government Code of Guam. It is therefore submitted that decisions from the State of Arkansas should not be regarded with any special authoritative significance.

In construing Section 43408 of the Government Code of Guam it should be borne in mind that to the extent the insurance exceeds the insured's insurable interest the contract of insurance becomes merely a wagering contract. As the Court stated in *Osborne v. Security Ins. Co.* (1957), 155 Cal. App. 2d 201, 205:

> "The rule that the purchaser of an insurance policy must have an insurable interest in the subject matter . . . pervades the entire field of insurance law . . . The object to be obtained by this rule, the reason for its being, is avoidance of wagering contracts . . ."

Such a failure of the insured to possess an insurable interest in the insured property vitiates the contract of insurance. *Napavale, Inc. v. United Nat. Indem. Co.* (1959), 169 Cal. App. 2d 119, 124.

For this Court to allow appellee to recover for more than the interest appellee possessed in the property destroyed would encourage wagering contracts and promote fraud and arson. It is therefore submitted that *Lighting Fixture Supply Co. v. Pacific Fire Ins.*

Co. (1932), 176 La. 499, 146 So. 35, and *Lyles v. National Liberty Ins. Co.* (1938), 182 So. 183 (cited at pages 7 and 8 of Appellant's Opening Brief) should be followed in construing Section 43408 of the Government Code of Guam.

II. APPELLEE WAS ERRONEOUSLY ALLOWED TO RECOVER FOR PERSONAL PROPERTY OF HER MARRIED MINOR DAUGHTER

While appellee correctly cites *Oslund v. State Farm Mutual Auto. Ins. Co.* (9th Cir., 1957), 242 F. 2d 813, 815-816, for the proposition that a motion for directed verdict must be interposed to reserve for appeal the question of sufficiency of the evidence, the problem presented herein is not technically a question of sufficiency, although inadvertently characterized as such in Appellant's Opening Brief at page 11. Rather the evidence and verdict affirmatively reveal that appellee was allowed to recover for the loss of property in which she possessed no insurable interest—her married daughter's clothing. Appellee's lack of insurable interest in such clothing precluded appellee of any right to recover for their loss.

CONCLUSION

It is respectfully submitted that the judgment appealed from must be reversed since as to the real property appellee may have recovered more than her insurable interest therein; and, it affirmatively appears that appellee recovered for the loss of personal property in which she did lack an insurable interest.

Dated, San Francisco, California,
March 19, 1962.

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No. 17437

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

JESSE A. S. LEWIS, ET AL., APPELLEES

Appeal from the United States District Court for the Southern District of California Northern Division

REPLY BRIEF FOR THE UNITED STATES, APPELLANT

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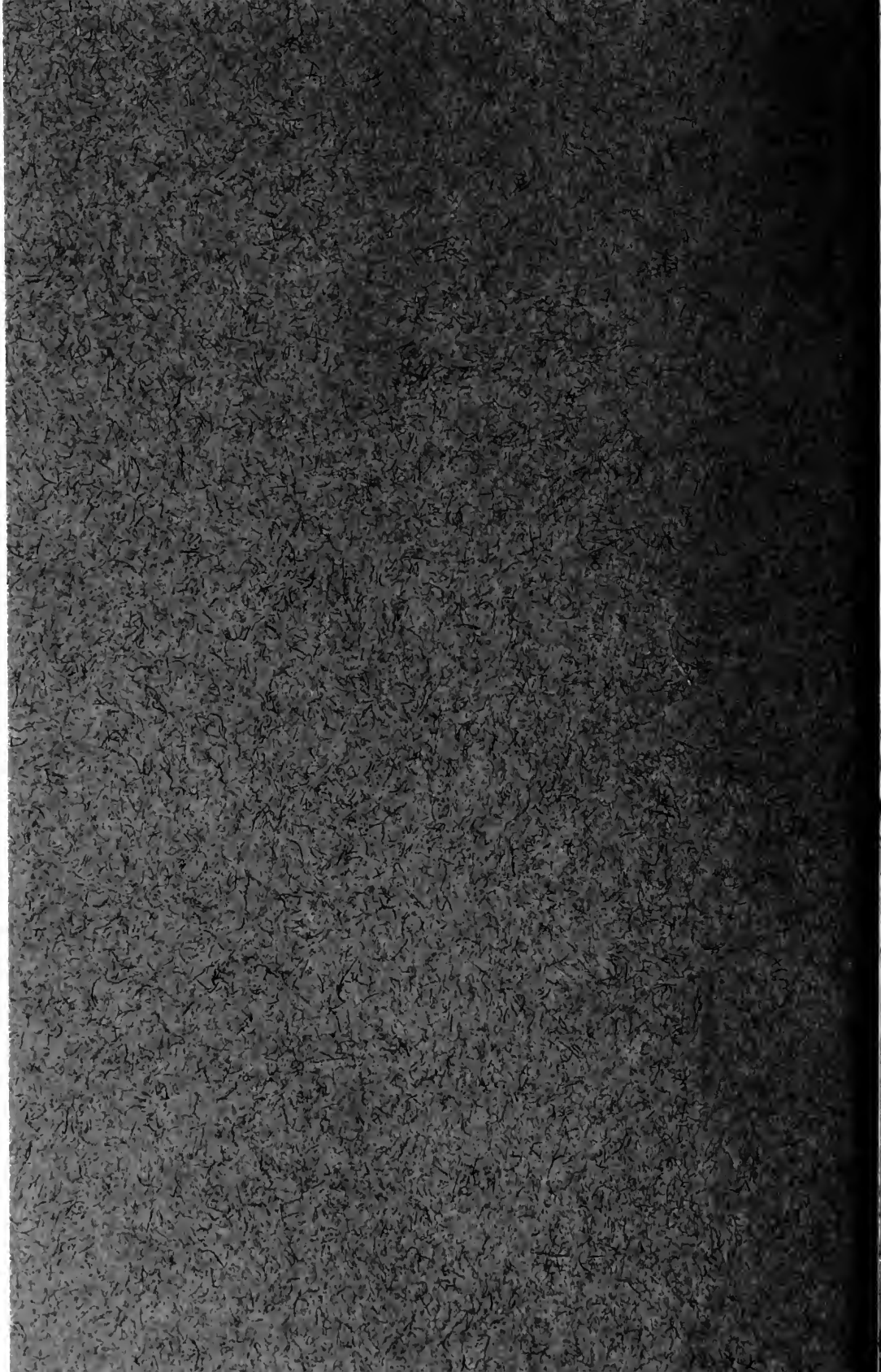

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Appeal from the United States District Court for the Southern District of California Northern Division

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REPLY BRIEF FOR THE UNITED STATES, APPELLANT

For the convenience of the Court, we will follow the same points made in our opening brief to show that no substantial response has been made to the arguments advanced by the United States.

I

A Commission Appointed Under Rule 71A(h), F.R.Civ.P., Is Required to File a Report Containing Detailed Findings Showing How Its Award Was Reached

We submit that the issue before the district court reviewing a commission under the "clearly erroneous"

provision of Rule 53(e)(II), F.R.Civ.P., is the same as the issue that would be before this Court reviewing the district court under Rule 52(a), F.R.Civ.P. Assuming that a trial judge had filed the same findings as did the commission here, would this Court say that the findings were adequate? Would this Court in such a case be able to determine on what basis the district court arrived at the award? In our view, the same criterion and the same limitations that apply to this Court's review of the district court should control the district court in the instant case. Even as to special masters, where a broader discretion exists in the district court as to what issues may be submitted to the master, and where there is some ground for saying that the master is an assistant judge, the courts have generally held that the district court is in the same position as the appellate court so far as the binding effect of the master's findings are concerned.[1] *Michelsen* v. *Penny*, 135 F.2d 409 (C.A.

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[1] There is a very important difference between the nature of Rule 71A(h) commissioners and special masters appointed under Rule 53 which is reflected in the approach that is taken upon review of their results. Masters are only appointed when, because of some exceptional circumstance, the judge does not determine the matter himself. *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957). And as *LaBuy* puts it (p. 256), "The use of masters is 'to aid judges in the performance of specific judicial duties, as they may arise in the progress of a cause,' *Ex Parte Peterson*, 253 U.S. 300, 312 (1920), and not to displace the court." Since this is a question of the judge appointing an assistant, Rule 53 provides that, in addition to discretion as to when a master shall be employed, the court in its order "may specify or limit his powers and may direct him to report only upon particular issues or to do or perform

2, 1943); *Republic National Bank of Dallas* v. *Vial*, 232 F.2d 785 (C.A. 5, 1956); *Leader Clothing Co.* v. *Fidelity & Casualty Co. of N. Y.*, 237 F.2d 7 (C.A. 10, 1956). In *Pallma* v. *Fox*, 182 F.2d 895 (C.A. 2, 1950), Judge Learned Hand said (p. 900), "We do not forget what we have so often said, and what indeed Rule 53(e)(2), F.R.Civ.P., 28 U.S.C. makes peremptory; i.e., that a master's findings are as conclusive upon the district court as that court's findings are conclusive upon us."

The Fourth and Fifth Circuit Courts have indicated a much broader authority of the district court in reviewing commissioners than the "clearly erroneous" standard as applicable to courts of appeals, and have ruled that the determination of value is a determination of the court and not of the commission. They have said that Rule 71A(h) is merely a guide to be

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particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report." Thus it has been said that "the Report of the master is advisory only." *D. M. W. Contracting Co.* v. *Stolz*, 158 F.2d 405 (C.A.D.C. 1946), cert. den. 330 U.S. 839.

Under Rule 71A(h) F.R.Civ.P., a choice, when a jury has been demanded, is not between commissioners and a court trial, but between jury trial and commissioners, and Rule 71A(h) itself, not the court, determines the scope of the respective powers and duties of the court and commissioners. Only some particular provisions of Rule 53(e), primarily those of a procedural nature, are made applicable to Rule 71A(h) commissioners. Also, since Rule 71A(h) commissioners are the parallel and the substitute for the jury to which the parties are generally entitled, the facts they have found should receive the same respect by the court.

followed in the exercise of discretion vested in the district judge, and not a limitation upon his power. *United States* v. *Twin City Power Company*, 248 F. 2d 108 (C.A. 4, 1957), cert. den. 356 U.S. 918; *United States* v. *Twin City Power Company of Georgia*, 253 F.2d 197 (C.A. 5, 1958); *United States* v. *Certain Interests in Property, Etc.*, 296 F.2d 264 (C.A. 4, 1961). While we think that rule is wrong, certiorari was not sought in the last-cited case because of deficiencies in the record.

Appellees contend that the findings of the commission in this case are in compliance with the court's direction to file a report "setting forth their conclusions as to the just compensation" and that no further findings are required of the commission. Such a report is the kind that has been rejected by the Fourth and Fifth Circuits, as shown in the Government's opening brief (pp. 12-14). The cases relied upon by appellees (Br. 8-10) do not sustain their contention, as we shall show:

We submit that the opinions in *United States* v. *Buhler*, 254 F.2d 876 (C.A. 5, 1958), and *United States* v. *Cunningham*, 246 F.2d 330 (C.A. 4, 1957), amply demonstrate the mistake in appellees' reliance upon the district courts' opinions in those cases which were reversed (Br. 10).

Baetjer v. *United States*, 143 F.2d 391 (C.A. 1, 1944), cert. den. 323 U.S. 772, was decided prior to the enactment of Rule 71A(h), F.R.Civ.P. The court pointed out that the Federal Rules of Civil Procedure

did not apply to condemnation cases except on appeal. Hence, the requirement of Rule 52(a) when actions are tried upon the facts without a jury, that "the court shall find the facts specifically and state separately its conclusions of law thereon," was not applicable. Indeed, the *Baetjer* case supports our position here, because there is the clear implication that detailed findings would have been required had Rule 52(a) been applicable.

United States v. *Pendergrast*, 241 F.2d 687 (C.A. 4, 1957), was an action for damages under the Federal Tort Claims Act, 28 U.S.C. sec. 1346(b). That this case has no applicability to the present case is shown by the statement in *United States* v. *Cunningham*, 246 F.2d 330 (C.A. 4, 1957), at page 333, footnote: "The case is very different from United States v. Pendergrast, 241 F.2d 687, where the issues were simple and we held that the decision below could be reviewed as well without findings as with them."

Carpenter, Babson & Fendler v. *Condor Pictures, Inc.*, 110 F.2d 317 (C.A. 9, 1940), was not a condemnation proceeding. It was a bankruptcy case and the order of reference "clearly indicated that the special master was not to make findings, but that the trial court would decide the facts." The order of reference to the commission in the present case contained no such instruction, and the district court had, we believe, no power under Rule 71A(h) to undertake to decide the case for itself on the findings before the commission. Rules 71A(h) and 53(e)(II) require the commission to make a report as well as findings.

Rule 71A(h) adopted only specific portions of Rule 53 relating to masters to establish the procedures to be followed, the powers of subpoena, and the like. Thus, rather than permitting the district court to control or limit the commissioners' functions, Rule 71A(h) itself provides that, when commissioners are employed, "the issue of compensation shall be determined * * * by the commission." Reference is made to Rule 53(c) only to give the commission "the powers of a master." The other provisions adopt other designated parts of Rule 53 for procedural purposes including the "clearly erroneous" standard of review by the district court.

Rule 71A(h) speaks of the "findings and report," not merely the report. This is an important difference. Report is the total document including the ultimate award. In exercising its power to correct errors of law, the district court may well be called upon to modify the report, for example, by excluding noncompensable items for which separate awards have been made.

In *United States* v. *2,477.79 Acres of Land in Bell County*, 259 F.2d 23, 29 (C.A. 5, 1958), the court specifically pointed out that the findings should show how the commissioners resolved the conflicts in the testimony. As shown in the Government's opening brief (p. 17), there were many conflicts in the evidence which the commission failed to show how they resolved, and no findings as to very material evidentiary facts which should have been made. Here again, the question is appropriate, would this Court, reviewing a valuation by a district court under Rule

52(a), F.R.Civ.P.,[2] consider adequate the report that has here been filed? In *Kweskin* v. *Finkelstein*, 223 F.2d 677 (C.A. 7, 1955), the judgment was reversed and the case remanded for "specific findings with reference to the material issues in the case." The court stated that a fair compliance with Rule 52(a), F.R.Civ.P., is mandatory, and findings of fact on every material issue are a statutory requirement. It stated further that "there must be such subsidiary findings of fact as will support the ultimate conclusion by the court. Kelley et al. v. Everglades Drainage District, 319 U.S. 415, 420, 422." Both because of the requirements of Rule 71A(h) and because of the failure of that rule to authorize the district court to control the functions of the commission, cases such as *Carpenter, Babson & Fendler* v. *Condor Pictures, Inc.*, 110 F.2d 317 (C.A. 9, 1940), where the trial court indicated that a referee was not to make findings, do not support the judgment here.

II

The Chairman and Another Commissioner Erred in Not Disqualifying Themselves from Hearing This Case Because of Their Association With Two Expert Witnesses for the Landowners

Appellees have made no direct answer to this point of the Government's brief. They state, without supporting authority, that the prior association of two

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[2] Since Rule 71A(a) provides that the other rules govern the procedure in federal condemnation cases "except as otherwise provided in this rule," Rule 52(a) now applies as to judge-tried condemnation cases.

of the commissioners with two of their witnesses would not be a basis for a challenge for cause on the part of a prospective juryman (Br. 12). As shown in our opening brief (p. 22), the Tenth Circuit reversed the judgment in *United States* v. *Chapman*, 158 F.2d 417, 419 (1947), because the district court refused to sustain the Government's challenge to a prospective juror who was an acquaintance of the Chapmans. "The great trend of modern authority is to exclude from juries all persons who by reason of their business or social relations, past or present, with either of the parties, could be suspected of possible bias, even though the particular status or relation is not enumerated in the statutes declaring the qualifications of jurors and the grounds of challenge." Jury, 31 Am. Jur. sec. 199; *Sherman* v. *Southern Pac. Co.*, 33 Nev. 385, 111 Pac. 416, 418 (1910). In *Boothe* v. *Baltimore Steam Packet Company*, 149 F.Supp. 861 (E.D. Va. 1957), the defendant requested a change of venue because the plaintiff was the mother of one of counsel in the case whose popularity in the area was generally recognized. The court stated that "these difficulties may be overcome by directing the presence of a full venire and permitting the interrogation of all prospective jurors as to their relationships, associations, and business dealings, if any, with plaintiff, her son, and his law firm."

Since the commission's award was approximately double the valuations of the Government's witnesses, the effect on the ultimate conclusion resulting from the prior association of the experts with two of the

commissioners cannot be dismissed as fanciful. We repeat the applicable statement of the Tenth Circuit in the *Chapman* case (p. 421), that "The suspicions of the Government may be more fanciful than real, but we are convinced that they are not wholly without foundation, and that, in our judgment, is sufficient."

The only other response of appellees is that it would be difficult to find an unbiased commission in Tulare County. If this factual premise is true, it does not, we submit, warrant affirmance of an award by a disqualified commission. If anything, it indicates the wisdom of the provision of the Tennessee Valley Authority Act, 16 U.S.C. sec. 831x, providing "and such commissioners shall not be selected from the locality wherein the land sought to be condemned lies." As we have pointed out in our opening brief, the *Chapman* case is not to be answered by the bootstrapping assertion of the commissioners that their prior associations with the witnesses would not influence their award (Br. 11-12).

III

The Valuation by the Appellees' Appraiser Arrived at by Adding to the Agricultural Damage to the Entire Unit a Value for the Gravel Deposit Was Erroneous

This point in the Government's opening brief involved, first, the discrepancy of $42,000 in the valuation of the property by George A. Murphy, appellees' appraiser, based on the carrying capacity of the two parcels of land owned by appellees, before and after

the taking, and second, the error in adding to the agricultural value the estimated value of the gravel on the parcel taken (pp. 26-32).

Appellees have argued that the valuation of ranches according to the carrying capacity of animal units is an accepted method of valuation (Br. 13-14). There is nothing in the Government's brief to the contrary and that is not the issue on this appeal. The quotation in the Government's brief (p. 27) from Murphy's testimony is not for the purpose of criticizing the method of valuation, i.e., the carrying capacity of animal units, but it is for the purpose of showing that he made an error of $42,000, for which he gave no explanation, which error, standing alone, was sufficient to vitiate the award based upon his valuation. Appellees do not attempt to make an explanation, but simply evade the question by stating that the Government "has lifted a few lines" of Murphy's testimony and "drawn a completely unwarranted conclusion from it" (Br. 13). The quotation speaks for itself, and clearly shows that Murphy's valuation was grossly incorrect.

Appellees also have distorted the Government's argument in regard to the gravel deposit. As shown by the two cases relied upon, *Georgia Kaolin Co.* v. *United States*, 214 F.2d 284 (C.A. 5, 1954), cert. den. 348 U.S. 914, and *United States* v. *Land in Dry Bed of Rosamond Lake, Cal.*, 143 F.Supp. 314 (S.D. Cal. 1956), such deposits should be given weight, but should not be considered apart from other proper elements of value. They are "simply one of the many elements that went to make up the value of the lands."

The Government's appraisers did not add any increment of value to the property taken by reason of the gravel deposit, as there was no lease on the property and no aggregate was being removed (R. 395-403, 528-530). And furthermore, the Government's witness, who was a geologist and metallurgical engineer, testified that his study of the area showed that practically all of the property in the Tule River basin had rock and gravel characteristics (R. 272-303). If they had considered that the market value of the property would have been enhanced because of the gravel deposit located therein, their valuations would have been based on what similar properties containing like deposits had been sold for in the vicinity, within a period not too remote from the date of taking, and not by estimating the amount of the deposit and multiplying it by the amount at which it might sell after removal. *United States* v. *5 Acres of Land, in Suffolk County, New York,* 50 F.Supp. 69, 71 (E.D. N.Y. 1943).

The cases relied upon by appellees (Br. 15-16) do not support their method of valuation of multiplying the number of tons of gravel by the price at which it might be sold after it is removed, and then added to the separate value of the land for other purposes. Although the court stated in *National Brick Co.* v. *United States,* 131 F.2d 30, 32 (C.A. D.C. 1942), that "the jury should have been informed by competent witnesses as to the quantity of the sand, the quality of the sand, the uses to which it might be put, whether there was a market for it," it added, "and the *value of the land with the sand in that market in*

its then condition." [Emphasis added.] The court specifically pointed out (p. 31) that "counsel for appellant was not seeking to prove the profit derived from the sale of the sand, or the value or price of the sand after it had been taken out of the bank" as was done in the present case by the witness Murphy (R. 219-221, 237-245). The fallacy of Murphy's method of valuation is appropriately stated in *United States* v. *Indian Creek Marble Co.*, 40 F.Supp. 811 (E.D. Tenn. 1941), where the experts for the landowner did exactly the thing that was done in this case, as follows (p. 822):

> Fixing just compensation for land taken by multiplying the number of cubic feet or yards or tons by a given price per unit has met with almost uniform disapproval of the courts. This is true because such valuation involves all of the unknown and uncertain elements which enter into the operation of the business of producing and marketing the product. It assumes not only the existence, but the continued existence of a stable demand at a stable price. It assumes a stable production cost and eliminates the risks all business men know attend the steps essential to the conduct of a manufacturing enterprise. It eliminates the possible competition of better materials of the same general description and of the possible substitution of other and more desirable materials produced or possible of production by man's ingenuity, even to the extent of rendering the involved material unmarketable. It involves the assumption that human intelligence and business capacity are negligible elements in the successful conduct of business. It

> would require the enumeration of every cause of business disaster to point out the fallacy of using this method of arriving at just compensation. No man of business experience would buy property on that theory of value. True it is that quality and quantity have a place in the mind of the buyer and the seller, but the product of these multiplied by a price per unit should be rejected as indicating market value when the willing seller meets the willing buyer, assuming both to be intelligent. Values fixed by witnesses on such a basis are practically worthless, and should not be accepted. To the extent the valuation fixed by any witness contains this speculative element, to the same extent is its value as evidence reduced.

The *National Brick Co.* case was considered in *United States* v. *70.39 Acres of Land*, 164 F.Supp. 451 (S.D. Cal. 1958), affirmed *sub nom. Carlstrom* v. *United States*, 275 F.2d 802 (C.A. 9, 1960), where the district court stated (p. 489):

> * * * We are in disagreement with the cases from the Eighth and Fourth Circuits, which permit minerals, timber, buildings, etc., to be valued separately from the land. Clark v. United States, 8 Cir., 1946, 155 F.2d 157, 160; Cade v. United States, 4 Cir., 1954, 213 F.2d 138, 141; United States v. 5139.5 Acres, etc., 4 Cir., 1952, 200 F.2d 659, 661. And in disagreement with National Brick Co. v. United States, 1942, 76 U.S. App.D.C. 329, 131 F.2d 30, if it be so interpreted.
>
> The better rule, to the contrary, is found in the Fifth, Sixth and Seventh Circuits, Georgia Kaolin Co. v. United States, 5 Cir., 1954, 214

> F.2d 284, 286; United States v. Meyer, 7 Cir., 1940, 113 F.2d 387; Morton Butler Timber Co. v. United States, 6 Cir., 1937, 91 F.2d 884, 887-888. You cannot separately value land and buildings for appraisal purposes in a condemnation suit. * * *

In a recent decision of the Second Circuit,[3] concerning claimed gravel value, that court adopted precisely this same rule, stating:

> Appellant rightly contends that if the condemned land contains a mineral deposit, such as gravel, it is proper to consider this fact in determining the market value of the land as a whole, but it is not permissible to determine separately the value of the mineral deposit and add this to the value of the land as a unit. The instructions on the retrial should recognize this principle.

In a footnote, the court cited: *United States* v. *Cunningham*, 246 F.2d 330, 333 (C.A. 4, 1957); *United States* v. *Meyer*, 113 F.2d 387, 397 (C.A. 7, 1940), cert. den. 311 U.S. 706; *United States* v. *Rayno*, 136 F.2d 376, 380 (C.A. 1, 1943), cert. den. 320 U.S. 776; *United States* v. *Glanat Realty Corp.*, 276 F.2d 264, 265 (C.A. 2, 1960). And, we submit, it is highly important in commissioner tried cases that their report show to what extent and in what manner they treated the claimed gravel value. That was precisely one of the points in *United States* v. *Cunningham*, 246 F.2d 330 (C.A. 4, 1957), which,

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[3] *United States* v. *158.76 Acres of Land, in the Town of Townshend, Windham County, Vermont*, decided January 19, 1962. Copies of this unreported opinion are submitted herewith, and copies have been served on opposing counsel.

speaking, *inter alia*, of a claimed mineral value, declares (p. 333): "It would not be proper, however, to attempt to arrive at value by adding these elements of value together." [4]

The other cases relied upon by appellees (Br. 15-16) do not support their method of valuation, but simply stand for the general principle that in determining fair market value of property, "the highest and most profitable use for which the property is adaptable and needed, or is likely to be needed in the near future, is to be considered; but elements affecting value that depend upon events, which while possible are not fairly shown to be reasonably probable, should be excluded." *Cameron Development Co.* v. *United States*, 145 F.2d 209, 210 (C.A. 5, 1944). Where there are deposits of aggregate in the land, it is to be considered, not separately as was done in the present case, but by considering "what similar properties containing like deposits of" such aggregate sold for in the vicinity within a period not too remote from the date of taking. *United States* v. *5 Acres of Land in Suffolk County, New York*, 50 F.Supp. 69 (E.D. N.Y. 1943). This is one of the cases relied upon by appellees (Br. 16), and clearly does not support their position.

Appellees make the fallacious contention that the Government has not objected to the amount of the award rendered by the commission, and unless the award of the commission is clearly erroneous it should

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[4] This decision indicates that earlier Fourth Circuit decisions should not be taken as authorizing valuation of minerals, timber, etc., separately from the land.

be accepted by this Court (Br. 18). The entire third point of the Government's opening brief (pp. 26-32) points out the errors of the appellees' valuation and the commission's award based thereon. The last paragraph points out that the award is based partially on the added value for the gravel and, since that testimony was inadmissible, "the finding is clearly erroneous, and the award should not be allowed to stand." It was also pointed out (pp. 27-28), that the witness Murphy's valuation of the land based on the carrying capacity of animal units contained a discrepancy of $42,000, which was sufficient error to vitiate the award based upon his valuation.

An exception to the commissioners' award merely on the ground of excessiveness would have presented nothing to the district court, just as a similar exception to a district court's findings would present nothing to this Court. In either case, it is not the function of the reviewers to reweigh the evidence and to either modify or reverse the award simply because it concludes the result to exceed or be less than fair market value. Cf. *Stephens* v. *United States*, 235 F.2d 467, 471 (C.A. 5, 1956).

CONCLUSION

For the foregoing reasons, it is submitted that the judgment should be reversed.

Respectfully,

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Assistant Attorney General.

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FEBRUARY 1962

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No. 17446

United States Court of Appeals

for the Ninth Circuit

NATIONAL UNION FIRE INSURANCE CO.,

Appellant,

vs.

LUISA SANTOS,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Guam.

Phillips & Van Orden Co., 4th & Berry, S. F., Calif.—Rec. 11/29/61—Printed 12/27/61

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of Guam,
Territory of Guam

Civil Case No. 32-60

LUISA B. SANTOS,

Plaintiff,

vs.

NATIONAL UNION FIRE INSURANCE CO., a Corporation,

Defendant.

PRETRIAL ORDER

I. Pleadings.

Plaintiff filed her complaint on the 22nd day of April, 1960, alleging that her residence in Merizo, Guam, burned on or about the 1st day of March, 1960, and that the dwelling and contents were insured by defendant in the amount of $10,000.00 against loss by fire.

Defendant answered on the 15th day of June, 1960, generally denying the allegations of the complaint and affirmatively alleging fire was caused by the willful acts of the plaintiff; that plaintiff had no insurable interest in the contents of the building; that plaintiff obtained the policy from the defendant by misrepresentation.

II. Discussion at Pretrial Conference.

Pretrial conference was held on July 19, 1960, at 2:00 o'clock p.m., and then continued to July 29,

1960, at 3:00 o'clock p.m. At the pretrial conference, counsel for defendant produced a copy of the insurance policy which was stipulated to be a true copy. Said policy covered the building of plaintiff in the amount of $8,000.00 and the contents of the building in the amount of $2,000.00. Counsel for the defendant at the pretrial conference contended that no schedule of lost contents had been furnished to defendant with the proof of loss. Counsel for plaintiff contended that the delay on part of defendant constituted a waiver for furnishing such information under Section 43405 of the Government Code of Guam. List of contents was furnished to counsel for the defendant and the court on August 2nd, 1960.

III. Issues.

1. Whether the fire was caused by perils insured against or whether the fire was caused by acts of the plaintiff or her agents.

2. Whether the plaintiff obtained the policy in question by any material misrepresentation.

3. Whether the plaintiff had an insurable interest in the furniture and fixtures lost in the fire.

4. Coverage under the policy as to the building and the contents.

IV. Stipulations.

1. It was stipulated that the Proof of Loss filed by the plaintiff and the copy of the insurance policy may be received in evidence without objection.

2. It was stipulated that there was a fire which totally destroyed plaintiff's residence and the concontents although it is not admitted by defendant what the contents were nor the value of said contents.

V. Witnesses for the Plaintiff.

1. The plaintiff will testify as to value of the house and contents destroyed by the fire, and as to representations made by her at the time of the issuance of the policy.

2. Mr. J. Perez of the Bank of America will testify as an expert witness on the value of the house at the time of the fire.

3. Mr. Al Carbullido, real estate broker, will testify also as an expert witness as to the value of the house at the time of the fire.

VI. Witnesses for Defendant.

1. Mr. Amado Jujo and Mr. Vicente Guerrero will testify as to representations made by plaintiff at the time the policy was issued and as to their inspection of the premises.

2. Mr. Danishmand will testify that he examined the house shortly after the fire and noticed the odor of kerosene. A fire lieutenant from the Guam Department of Public Safety will similarly testify.

3. Mr. Al Brooks of Marianas Electric and Supply Company will testify as to the character of the plaintiff where relevant.

4. A representative from Radio Center will testify similarly to Mr. Brooks.

Additional witnesses may be noticed not less than five days before the trial by either party in writing.

VII. Order.

The above stipulations are approved and the cause is set for trial by jury on the 30th day of August, 1960, at 9:30 o'clock a.m.

/s/ EDWARD P. FURBER,
Designated Judge,
District Court of Guam.

Approved:

/s/ W. SCOTT BARRETT,
Attorney for Plaintiff.

/s/ E. R. CRAIN,
Attorney for Defendant.

[Endorsed]: Filed August 11, 1960.

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the plaintiff, Luisa B. Santos, and against the defendant, National Union Fire Insurance Company, a corporation, in the sum of $8,000.00 for real property, and $2,000.00 for personal property, total of $10,000.00.

Date: October 11, 1960.

/s/ JOHN L. GILMAN,
Foreman.

[Endorsed]: Filed October 11, 1960.

[Title of District Court and Cause.]

OPINION

This is an action by plaintiff Luisa B. Santos to recover, on an insurance policy, for the loss by fire of certain realty and the contents thereof. A jury returned a verdict in favor of plaintiff in the amount of $10,000. Plaintiff now seeks a judgment, not only for the $10,000, but also for additional damages and attorney's fees under the following statute:

> In all cases where loss occurs and the insurer liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such insurer shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent (12%) damages upon the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of said loss * * *. Guam Gov. Code §43407, Pub. L. No. 102, 4th Leg., 4th Sess. (July 1, 1959).

Defendant is resisting these additional statutory amounts.

The facts bearing upon the present controversy are undisputed. The plaintiff's loss occurred on March 1, 1960. A proof of loss was furnished the defendant by the plaintiff on March 30, 1960. On April 22, 1960, the present action was commenced. A stipulation was filed on May 2, 1960, whereby it was agreed between the parties that the defendant should have "to and including the 1st day of June, 1960, to answer or otherwise plead." Defendant's answer was filed on June 15, 1960, and it admitted therein the allegations contained in paragraph seven of the complaint, which paragraph stated, "That though demand was made by plaintiff, defendant has not paid the said loss, nor any part thereof, but refuses to do so." The provision of the insurance policy dealing with the time within which defendant was obligated to pay the loss reads as follows:

> The amount of loss for which this company may be liable shall be payable 60 days after proof of loss * * *.

The plaintiff contends that the defendant, by admitting in its answer the allegations of paragraph seven of the complaint, "That though demand was made by plaintiff, defendant has not paid the said loss, nor any part thereof, but refuses to do so," defendant has admitted that it had denied all liability under the policy. This is not necessarily so. By admitting the truth of this language, defendant only admits that it had refused to pay the amount demanded by the plaintiff, not that it had contended

that it was without any liability whatsoever. Moreover, plaintiff herself admits, in her "Memorandum on Statutory Penalties," that the defendant, prior to the commencement of this action, had offered to pay at least $4,000 in compromise of the plaintiff's claim.

Government Code of Guam §43407 was adopted without substantial change from an Arkansas statute, Ark. Stats. §66-514, and for that reason Arkansas decisions construing that Arkansas statute are persuasive. Cf. Sauget v. Villagomez, 228 F. 2d 374, 376 (9th Cir. 1955).

The statute under consideration is "highly penal and is to be strictly construed." Equitable Life Assurance Society v. Hughes, 152 F. Supp. 187, 195 (E. D. Ark. 1957). It has been said that "if an insurance company denies liability the insured may file suit immediately on the policy" without waiting until the end of the sixty day grace period provided for in the policy. Willis-Reed Lumber Co. v. New York Underwriters Ins. Co., 146 F. Supp. 74, 80 (W. D. Ark. 1956). However, where, as in the present case, the insurer does not deny all liability, but, rather, makes a compromise offer, and the insured commences an action thereafter, but before the sixty day grace period has expired, the rule is that the action is premature and the insured cannot recover the statutory penalties or attorney's fees. Id. at 80-81. In light of this rule, plaintiff Luisa B. Santos is precluded from recovering the penalties

and attorney's fees provided for in Government Code of Guam §43407.

The plaintiff may prepare a judgment in conformity with this opinion.

It is so ordered.

Dated at Agana, Guam, this 15th day of December, A.D. 1960.

/s/ EUGENE R. GILMARTIN,
Judge,
District Court of Guam.

[Endorsed]: Filed December 15, 1960.

In the District Court of Guam
Territory of Guam
Civil Case No. 32-60

LUISA B. SANTOS,
Plaintiff,

vs.

NATIONAL UNION FIRE INSURANCE CO., a Corporation,
Defendant.

JUDGMENT UPON VERDICT

This matter having come on for trial on the 11th day of October, 1960, before a jury, the above-named plaintiff appearing by W. Scott Barrett, her attorney, and the above-named defendant by E. R. Crain, its attorney. A jury of twelve persons was regularly impaneled to try said action and witnesses

on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions by the Court, the jury retired to consider their verdict and subsequently returned into court, and being called answered that they returned a verdict in favor of the plaintiff in the amount of $10,000.00

And the Court having rendered its opinion on the 15th day of December, 1960, holding that plaintiff is not entitled to 12% penalty and attorneys' fees as provided for in § 43407 of the Government Code of Guam;

Now, therefore, it is hereby ordered, adjudged and decreed by this Court that the said plaintiff, Luisa B. Santos, do have and recover of and from the said defendant, the sum of $10,000.00 with interest thereon at 6% per annum from the date of verdict until paid;

Now, therefore, it is further ordered, adjudged and decreed that Luisa B. Santos, plaintiff, is entitled to no penalty or attorneys' fees pursuant to § 43407 of the Government Code of Guam, but is entitled only to the amounts herein stated together with her costs herein taxed at $37.00.

Dated: Agana, Guam, this 13th day of January, 1961.

/s/ EUGENE R. GILMARTIN,
Judge, District Court of
Guam.

[Endorsed]: Filed January 13, 1961.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the defendant, National Union Fire Insurance Company, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on January 13, 1961.

Dated this 9th day of February, 1961.

/s/ E. R. CRAIN,
Attorney for Defendant.

[Endorsed]: Filed February 9, 1961.

District Court of Guam
Territory of Guam
Civil Case No. 32-60

LUISA B. SANTOS,
Plaintiff,

vs.

NATIONAL UNION FIRE INSURANCE COMPANY, a Corporation,
Defendant.

TRANSCRIPT OF PROCEEDINGS
October 11, 1960

Appearances:

W. SCOTT BARETT of
TURNER, BARRETT & FERENZ,
Attorneys at Law,
Agana, Guam,
For Plaintiff.

E. R. CRAIN,
Attorney at Law,
Agana, Guam,
For Defendant.

Be It Known that on this 11th day of October, 1960, at the hour of 9:30 a.m., there appeared the above counsel before the Honorable Eugene R. Gilmartin, Judge, District Court of Guam, in the Courtroom, Guam Congress Building, Agana, Guam.

That at said time and place there transpired the following:

The Clerk: Your Honor, the roll call has been taken, 45 members of the panel answer present.

The Court: Call the case, Mr. Clerk.

The Clerk: Civil Case No. 32-60, Luisa B. Santos, plaintiff, vs. National Union Fire Insurance Company, a defendant, a corporation, defendant, coming on for trial to a jury.

The Court: Both sides ready?

Mr. Barrett: Ready, your Honor. [1*]

Mr. Crain: Ready.

The Court: Call a jury.

(Jury of twelve duly empaneled and sworn.)

Mr. Barrett: I believe the two exhibits stipulated in evidence have been marked.

The Court: They have not been marked.

Mr. Barrett: I would like to have them marked.

The Clerk: You mean Plaintiff's 1 and 2?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The Court: You may make your opening statement now, Mr. Barrett.

(At this time certain documents were marked Plaintiff's Exhibits 1 and 2, respectively, in evidence.)

Mr. Barrett: Your Honor, members of the jury, as the Court has stated, my name is Scott Barrett, I represent the plaintiff as her attorney. In October of 1959, Mrs. Santos, the plaintiff, at the urging of an agent of the defendant, Mr. Guerrero, finally decided to take out a policy of insurance, both on the contents of the store which she was operating at the time and on her residence in Merizo. The evidence will show that the amount of the policy was at the suggestion of the agent of the company, which is the defendant. In March of 1960, four o'clock in the morning on the 1st day, Mrs. Santos, who was in her bedroom, together with Mr. Gregorio Sanchez; now Mrs. Santos and Mr. Sanchez are not married, we are not trying to hide that; she had been living with him for some time; both of them are divorced; Mrs. Santos' three children are also asleep in the bedroom of the house, in the bedroom adjoining. At four o'clock in the morning, they were awakened by smoke which apparently had filled the house and Mrs. Santos and Mr. Sanchez immediately ran to the children's bedroom. There are [2] three children there, the oldest being thirteen years of age, the daughter of Mrs. Santos, another younger girl who is being taken care of by Mrs. Santos for some time, and the baby apparently which the mother did not

want but Mrs. Santos had been caring for, two months old. She took the children, she carried the baby, tried to run out the door. The house is of such a nature the front door is in the front part of the living room and the back door is straight through the house in the kitchen and the bedrooms are all windows, there is no exit. They found, in trying to go through the living room, it was filled with flames, they couldn't get out. They ran back in the children's bedroom; Mr. Sanchez picked up a chair and knocked out a window and the louvers that were there also and they were able to get out the window.

Thereafter, Mrs. Santos was advised she should go to the company and give notice, but before she did that the agents of the company came down to look at the damage. They had apparently heard from someone else there had been a fire. She talked to a Mr. Aquino at the scene of the fire some two or three days afterwards and he advised her to bring in a list of the contents that had been destroyed. This she did and then filed a proof of loss, which was incomplete. It has been stipulated by counsel that it will be in evidence, as will the policy. You can look at it. The policy was written for $8,000 for the house and $2,000 for the contents. The company refused to pay the full amount of the policy and suit was therefore brought. The company has raised certain defenses of misrepresentation and arson, which, of course, is their burden to prove. We contend there was no such thing, the fire was of unknown origin, accidental, the policy should be paid. Whether or not it [3] is, will be left to your

discretion in finding the facts. I know you will listen to them very careful. Thank you very much.

The Court: Mr. Crain, you wish to make a statement at this time?

Mr. Crain: No. May we approach the bench, please?

The Court: Yes.

(Counsel and the reporter approached the bench where the following transpired out of hearing of the jury:)

Mr. Crain: I thought it was improper for me to interrupt while Mr. Barrett was making his opening statement, but his statement has gone so far afield from the issues in this case that I feel the jury is already prejudiced and at this time I am moving the Court to dismiss the jury, call it a mistrial.

Mr. Barrett: In what respect?

Mr. Crain: This business about the fire and the flames and the children in the bedroom and the difficulty of getting them out of the house and that sort of thing.

The Court: I don't think that has any materiality.

Mr. Crain: Of course not.

The Court: At the same time, there were probably many things said by counsel in opening statements, either that they cannot prove or may not be material, which would be ruled upon by the Court at the time of the introduction. The general statement to the jury as to outlining the plaintiff's case——

Mr. Crain: This wasn't outlining the plaintiff's case.

The Court: Well, I don't see anything that, what counsel has said during his opening remarks to the jury that would prejudice the defendant, nor the defense in this case. The jury at this point [4] does not know, and I think what Mr. Barrett's remarks were based on, was based on the pleadings in the case. Where it might be considered a little unusual, probably, for him to recite the defendant's case or refer to what the defense might be in the case, yet I don't think, from the remarks he has made at this point, that it is prejudicial to the defendant or the defense in this case and I will deny your motion.

Mr. Crain: Thank you.

(Back in open court.)

Mr. Crain: If the Court please, I will waive the opening statement.

The Court: You waive your opening statement?

Mr. Crain: Yes, sir.

The Court: Call your first witness, Mr. Barrett.

Mr. Barrett: Before that is done, your Honor, I would like to have the two exhibits stipulated in evidence, as marked, introduced in evidence.

The Court: There any objection?

Mr. Crain: Actually, this is the original.

The Court: This in evidence by stipulation. If there is no objection, it may be introduced in evidence and may be marked, the insurance policy may be marked Plaintiff's Exhibit No. 1 in evidence.

Mr. Crain: No objection.

The Court: By stipulation of counsel, Plaintiff's Exhibit No. 2, which will be the proof of loss, may be introduced in evidence.

Mr. Barrett: Mrs. Santos. [5]

LUISA B. SANTOS

the plaintiff herein, took the witness stand on her own behalf, being first duly sworn, was examined and testified, as follows:

Direct Examination

By Mr. Barrett:

Q. Would you——

The Court: Mrs. Santos, keep your voice up so that the jurors can hear you.

And members of the jury, we will probably, from time to——

(Outside interference.)

The Court: See if I can speak above the chimes. From time to time we will have interruptions from outside noises, as you are now hearing them, and if at any time you cannot hear everything that the witness says, just raise your right hand and that will indicate to me that you did not hear the answer and I will have the witness either repeat the answer or have the Court Reporter read the answer back to you. So if there is chimes or aircraft or other outside disturbances during the course of the trial that prevent you from hearing all the testimony, just raise your right hand and I will

(Testimony of Luisa B. Santos.)

know that you didn't hear the answer and I will see that you hear it.

Q. (By Mr. Barrett): Would you state your name, please?

A. My name is Luisa Baza Santos.

The Court: Speak up, Mrs. Santos.

Mr. Barrett: Please speak as close to the microphone as you can.

A. My name is Luisa Baza Santos.

Q. (By Mr. Barrett): And where do you live, Mrs. Santos? [6]

A. At present I was living at Agat.

Q. And where did you live prior to March 1st, 1960? A. In Merizo.

Q. You are the plaintiff in this case?

A. Yes.

Q. Now did a fire occur at your residence in Agat? A. My residence was in Merizo.

Q. In Merizo, I beg your pardon. And when did that fire occur? A. March 1st, 1960.

Q. What time of the day or night did it happen?

A. Around four o'clock in the morning.

Q. Where were you at the time that you first noticed there was a fire?

A. I was in my bedroom.

Q. And what did you first notice?

A. I was awakened by the smell of smoke.

Q. Was there anyone in your bedroom with you?

A. Yes.

Q. Who was that?

A. Mr. Gregorio Sanchez.

(Testimony of Luisa B. Santos.)

Q. And what did you and Mr. Sanchez do when you were awakened?

A. We rushed over to the children's bedroom and awake up the children. I grab the baby in my arms.

Q. Where did you go then?

A. We go back to the, we opened the door of the bedroom, tried to go back to the living room but we couldn't get out so we [7] turned back to the children's bedroom then.

Q. Why couldn't you get out?

A. The living room was already on fire.

Q. And you went back to the bedroom, what did you do?

A. Mr. Sanchez tried to break down the window, which he did, and we throw out the children, out the window, myself.

Q. How did he break the window, if you know?

A. By the chair, hitting it with the chair.

Q. What did you do after that?

A. I was calling for help and then I run over to my uncle's house.

Q. Where does he live from your house in Merizo? A. About two blocks.

Q. Now after the fire, did you contact the defendant, the insurance company?

A. No, the fire investigator was down there and he told me that I have to notify the insurance company, then the Commissioner was down there, too, and he told me I have to notify them and told them that if he can do it because I can't go down there.

(Testimony of Luisa B. Santos.)

The next day the insurance company was down there, the adjuster.

Q. Who was there, do you know him by name?

A. Mr. Aquino and one statesider, I don't know his name, and I just know this other one by the name of Henry.

Q. I see. Now did Mr. Aquino say anything to you or tell you to do anything?

A. He told me to come down to his office, which I did three days later, and he told me to, he asked me to make the list of the contents. [8]

Q. Did you do that?

A. I did, I gave it to him.

Q. When did you give it to him?

A. The next day.

Q. Did he say anything at the time you gave it to him?

A. I gave him the list and he told me to come down the next day, which I did, and then he was asking me, he says he has no, he has nothing against the contents, he says he agrees with it and he is willing to pay for it, but he is asking me to settle the house for $4,000.

Q. Did he say why?

A. He said that I file a homestead.

The Court: What is that answer?

A. I file a homestead.

Mr. Barrett: Homestead.

A. Valued at $3,000 and so——

Q. (By Mr. Barrett): Had you filed a homestead on your house? A. I did.

(Testimony of Luisa B. Santos.)

Q. And how did you get the value you put on that?

A. From the asset value of the Government.

Q. From the what?

A. From the Government, that is the value of the Government.

Q. The assessed value?

A. The assessed value.

Q. I see. Now this list of the contents that you gave to Mr. Aquino, who prepared it?

A. I did. [9]

Q. How did you prepare it?

A. I list it down, put the price down and where I bought it.

Q. Was it in your handwriting?

A. It was in my handwriting.

Q. Now did you ever prepare another list after that one?

A. I prepared one after, after Mr. Barrett told me he was denied of the copy by the insurance company in which I gave Mr. Aquino.

Q. You prepared another list?

A. I prepared another list.

Q. Do you have that with you?

A. I have that with me.

Q. Now to the best of your knowledge, is that list the same as the one you gave to Mr. Aquino?

A. Yes, sir.

(Document examined by counsel for the defendant.)

(Testimony of Luisa B. Santos.)

Q. (By Mr. Barrett): Mrs. Santos, can you remember what the contents of your house were and your estimated value without looking at any list?

A. I guess I can remember some.

The Court: I didn't get that answer, Mr. Barrett.

Mr. Barrett: What?

The Court: I didn't get that answer.

Read the question and answer.

(Last question and answer read back by the Reporter.)

Q. (By Mr. Barrett): Mrs. Santos, when did you prepare this list that you have in your [10] hand?

A. When I went down to Mr. Barrett's office and told him of my contents and he told me that he was denied of the list from the adjuster.

Mr. Barrett: Your Honor, we would like a ruling now. I think Mr. Crain is going to object and we would like Mrs. Santos to use this writing to refresh her recollection, not to introduce it in evidence.

The Court: Is there any objection, Mr. Crain?

Mr. Crain: I don't understand what counsel is driving at. I have no objection.

The Court: No objection, the witness may use the list to refresh her recollection, there being no better list either on file or present, as far as the file is concerned in this matter, or the records of the insurance company.

(Testimony of Luisa B. Santos.)

Q. (By Mr. Barrett): Mrs. Santos, would you then refer to the list and state to the Court what contents in your house were lost in the fire and your estimated value of them at the time of the loss?

A. In the kitchen I have the refrigerator which cost $267.50.

Q. Where did you buy it?

A. At the Marelco.

Q. And how long had you had it at the time of the fire? A. Two and a half years.

Q. And what is your estimate of its value at the time of the fire?

A. One hundred and fifty.

Q. You still owe anything on that refrigerator to anyone? [11] A. Yes, I did.

Q. What else was in the kitchen?

A. The range, G. E. Range, which cost $285, and at the time of the fire, about $200.

Q. That your estimate of its value at the time of the fire? A. Yes.

Q. Did you owe anything on that to anyone?

A. I do.

Q. Was there anything else in the kitchen?

A. The dishes and the silverware.

Q. Could you describe it a little?

A. I have some china, Chinese tea sets there, and silverware of all kinds and dishes.

Q. And do you know what their cost was to you and how old they were?

A. I valued them all at $150.

(Testimony of Luisa B. Santos.)

Q. And in your best estimate, what was their value at the time of the fire? A. About $125.

Q. What else was there in the kitchen, if anything? A. Reno Ware, $170.

Q. Just what is Reno Ware, what is it?

A. Set of pots, valued at $100.

Q. At the time of the fire you valued them at $100? A. Yes.

Q. I think you said it cost $170. There anything else in the kitchen?

A. The dining tables. [12]

Q. How old is that?

A. One set is seven months old, it cost us $72.50, and the other one is five years old.

Q. You had two dining sets? A. Yes, sir.

Q. And what is your estimate of the value of the new set at the time of the fire?

A. I value the other one at $25 and the new set at $50.

Q. Now you said "set," just a table or something else with it? A. Table and chairs.

Q. How many chairs?

A. The other one has four chairs and the other one is five chairs.

Q. Anything else in the kitchen that was destroyed, to the best of your knowledge?

A. I have a sink there.

Q. The what? A. The sink.

Q. Well, that is a part of the house.

A. Yes.

Q. How about the living room?

(Testimony of Luisa B. Santos.)

A. The living room I have the rattan set.

Q. How many pieces?

A. Twelve pieces rattan set.

Q. Do you know how old that was?

A. About two and a half years.

Q. Do you know what it cost? [13]

A. Three twenty-nine, ninety-five.

Q. Where did you buy it? A. Ada.

Q. And what was your estimate of its value at the time of the fire? A. About $250.

Q. Anything else in the living room?

A. I have the nara set. I value it at, bought it at $155 and I value it at $100 at the time of the fire.

Q. Now what, what was the nara set, could you describe it a little? A. I beg your pardon?

Q. What could you describe the nara set?

A. It was a coffee table, end tables and chair.

Q. Anything else in the living room?

A. Encyclopedia set, Grolier.

Q. How old was that?

A. It was three years old.

Q. And how much did you pay for that?

A. Two sixty-nine.

Q. What did it consist of?

A. The Encyclopedia, Book of Knowledge, Lands and Its People, and I think I have the complete set of that.

Q. And what was your estimate of its value at the time of the fire? A. Two hundred.

Q. Anything else in the living room?

(Testimony of Luisa B. Santos.)

A. I have the decoration and picture [14] frames.

Q. How many?

A. I have quite a few decorations. I have four of them for the table, I mean seven of them, table vases and those, those that they place on the table just for decoration, and the wall.

Q. And what was your estimate of their value at the time of the fire?

A. I valued them at $100 and at the time of the fire about $50.

Q. About $50 at the time of the fire. Anything else in the living room?

A. That is all that I can remember.

Q. What about the bedrooms?

A. In my bedroom I have three-quarter beds, which I bought for $125.

Q. How old were they?

A. It is three years.

Q. What is your estimate of its value at the time of the fire? A. One hundred dollars.

Q. Did it have a mattress?

A. It had an inner spring and the box.

Q. Any other beds?

A. And that is all I have, and the ifil wood table in my room.

Q. What about the other bedroom?

A. The other bedroom I have a double bed.

Q. How old was that?

A. Two and a half years. [15]

Q. When did you buy it, or, rather, where did

(Testimony of Luisa B. Santos.)

you buy it? A. Morroco.

Q. And what is your estimate of its value at the time of the fire? A. About $200.

Q. Was that bed completely paid for?

A. Not yet, still owe some.

Q. Anything else in the bedrooms?

A. The dresser, chest of drawers.

Q. And what is your estimate of the dresser value at the time of the fire? A. About $50.

The Court: Mr. Barrett, we will take a short recess at this point. Take the jury out. I must warn the jury before you leave that, do not discuss this case yet among yourselves and do not discuss the case with anyone else until the case is completed and the Court turns the case over to you for decision. You may now take a short recess.

(Whereupon, a short recess was taken at this time.)

The Court: Let the record show the jurors are present in the jury box; counsel for the plaintiff and defendant are in the courtroom.

Continue with your examination of the witness, Mr. Barrett.

Q. (By Mr. Barrett): Mrs. Santos, I think you just mentioned the three-quarter bed and double bed. Were there any other beds in the house?

A. There was one single bed.

Q. And where was that? **[16]**

A. It was in the, in the hall to the bathroom.

Q. Do you know how old it was?

(Testimony of Luisa B. Santos.)

A. About five years.

Q. And what did it cost you new, or when you got it? A. Twenty-five dollars.

Q. What was your estimate of its value at the time of the fire? A. Ten dollars.

Q. Now in the way of miscellaneous items, what did you have in the house at the time of the fire?

A. We have our clothings, all our linens and jewelries and I have a few cash.

Q. What? A. Money.

Q. Money? A. Uh huh.

Q. What did you have in the way of clothing?

A. I have linens, towel, pillow cases, linens, bed spreads.

Q. Let's take it one item at a time. How many bed sheets and pillow cases did you have, do you know? A. I have about ten sheets.

Q. What about towels?

A. Towels, I have about two dozen.

Q. And shoes? A. Shoes, I have five pair.

Q. What about clothing for yourself and the children?

A. I have about fifteen dresses and does my daughter, has about that much. [17]

Q. How old is your daughter?

A. Thirteen years old.

Q. What about the clothing of the other two children?

A. The baby has quite a few of them. This other girl didn't have much because she just, she was just

(Testimony of Luisa B. Santos.)

sent down by her parents and we were all sick at the time, to help around the place.

Q. How old was the baby?

A. The baby was about seven months old at the time of the fire.

Q. What is your estimate of the value of all these miscellaneous items at the time of the fire?

A. I estimate all of the clothing at $500.

Q. You refer to your list now and see if there is anything you haven't mentioned that you lost in the fire?

A. I have lost about $268 in cash.

Q. Where was that? A. In the house.

Q. What part of the house?

A. It was in my wallet.

Q. Where was your wallet at the time of the fire, do you know?

A. It was on top of the dresser.

The Court: That amount $216?

A. Two sixty-eight.

Q. (By Mr. Barrett): Is there anything else on the list that you haven't mentioned?

A. I guess I mentioned them all.

Mr. Crain: If the Court please. [18]

The Court: Mr. Crain.

Mr. Crain: The cash that she is describing is not included in the items, not included in any of the so-called lists furnished by the or of the various items.

Mr. Barrett: I will stipulate to that.

(Testimony of Luisa B. Santos.)

Mr. Crain: I will stipulate the cash has not been mentioned.

Mr. Barrett: As is the jewelry she has mentioned also.

The Court: Jewelry and cash, those two items to be excluded.

Mr. Crain: They should be stricken, yes, sir.

The Court: Very well.

Q. (By Mr. Barrett): Mrs. Santos——

The Court: As to the value of the jewelry, what was the value of the jewelry?

Q. (By Mr. Barrett): Mrs. Santos, did you discuss the cash and the jewelry with Mr. Aquino when you talked to him?

A. I told him about that and he says that I didn't, that is not included in the policy.

Mr. Crain: If the Court please——

A. Our clothing——

The Court: Wait a minute.

Mr. Crain: I have previously moved to exclude this.

The Court: My question was, Mr. Barrett, what was the amount given by this witness as to the value of the jewelry?

Mr. Crain: She gave none.

The Court: I understood she placed some value on the jewelry. I didn't, I don't have it in my notes. Did this witness give any?

Mr. Barrett: I have no objection to her testifyfying to what [19] the value was if Mr. Crain has no objection.

(Testimony of Luisa B. Santos.)

Mr. Crain: I think she was including that in this lump sum of $500.

The Court: Well, the testimony as to the cash of $268 may be excluded. The jury is instructed not to consider the amount of cash that was lost in this particular fire, or the testimony, rather, to the $268, as being stipulated by counsel as not being covered under the insurance policy.

Q. (By Mr. Barrett): Now Mrs. Santos, this estimate of $500 on your miscellaneous items, did that include the jewelry? A. No.

Q. How did you happen to take out a policy of insurance on your house?

A. Mr. Guerrero, the one that is working over there, is after me for the insurance. I decided to insure the contents of the store that I was running down in Agat. I decided to insure my house, too, at the same time since he was after me.

Q. Who is this Mr. Guerrero?

A. I just know him by Leon Guerrero. He was working for the insurance company.

Q. And has he ever, had he ever been at your house before the fire? A. Yes.

Q. Had he been inside it? A. Yes.

Q. What did you do when you decided to take out a policy?

A. I went over to the office and make the payment. The policy was already made. [20]

The Court: Is this material, Mr. Barrett?

Mr. Barrett: I think so, your Honor.

The Court: I don't think there is any question

(Testimony of Luisa B. Santos.)

about a policy of insurance being issued and the date and the amount, the property covered, speaks for itself under your Exhibit No. 1.

Mr. Barrett: I am only going into it because there is an allegation, your Honor, the answer of misrepresentation in obtaining the policy.

The Court: Very well.

Q. (By Mr. Barrett): Did you tell Mr. Guerrero how much you wanted to insure your house and contents for?

A. He asked me about the house and then he is the one that told me that he will insure the house for $8,000 and the contents for $2,000.

Mr. Barrett: That is all the questions I have now.

The Court: Mr. Crain.

Cross-Examination

By Mr. Crain:

Q. Mrs. Santos, I believe on the 22nd of March of this year you signed a sworn statement in proof of loss concerning this fire, did you?

A. Yes.

Q. Huh? A. Yes.

Q. Did you swear to the contents of that statement, did you? A. I beg your pardon? [21]

Q. Did you swear to the truth of the contents of that statement? A. Yes.

Q. Do you remember before whom you swore to the truth of the contents of that statement?

A. What do you mean?

(Testimony of Luisa B. Santos.)

Q. Do you remember the person?

A. Mr. Aquino.

Q. Mr. Aquino. You have been handed Exhibit No. 2. Do you find your signature on that exhibit?

A. Beg your pardon?

Q. Is your signature on that exhibit?

A. Yes.

Q. Can you tell us now the name of the person before whom you swore to the truth of that statement? A. You mean the notary public?

Q. Uh huh. A. Mr. Joe Lujan.

Q. You know Mr. Lujan? A. Yes.

Q. Did you give him the information that is contained in the body of that statement or did you fill that out yourself? Who filled that out?

A. Beg your pardon?

Q. Who filled it out?

A. It was filled out in Mr. Barrett's office.

Q. Did you see it filled out? A. No. [22]

Q. The information that is contained in there, is that information that you gave to someone?

A. Yes.

Q. Is it correct? A. Yes.

Q. Your whole loss in this fire that you have described this morning was $17,000, is that right?

A. For the fire investigator was up there and he was asking me: What do I think the value of my building would cost me, I told him "As for myself, it will cost me that price."

Q. How much? A. Seventeen.

(Testimony of Luisa B. Santos.)

Q. Who did you give this information to in order that it be included in this proof of loss?

A. I talked to Mr. Barrett.

Q. So as far as you know, Mr. Barrett was the one who valued your property at $17,000 upon the information you gave him?

Mr. Barrett: Object to that, your Honor.

The Court: Don't answer.

Mr. Barrett: She has already testified she gave me this information.

The Court: I don't think that is the testimony, Mr. Crain, I don't think that is the testimony.

Mr. Crain: She said she didn't know who filled it out.

The Court: You asked her whether or not Mr. Barrett——

Read the question.

(Last question read back by the Reporter.)

Mr. Crain: I will strike that. [23]

The Court: You wish to withdraw the question?

Mr. Crain: Yes, please.

The Court: The question may be withdrawn; the answer may be withdrawn.

Q. (By Mr. Crain): It is correct, then, that you told Mr. Barrett that you valued your property at $17,000? A. Yes.

Q. Now is that the building alone?

A. The building and the things I lost.

Q. Everything you lost, you mean the building and the contents? A. Yes.

(Testimony of Luisa B. Santos.)

Q. Can you tell us why, in answer to question six, you said the cash value of the property at the time of the loss was $12,000?

A. That is for the building.

Q. That is for the building alone?

A. Uh huh.

Q. So that you then valued the personal property at $5,000, is that right?

A. The value of my contents and everything.

Q. At $5,000. Now was there any change as to the quantity or quality of the items, actually, of the contents of your house from October, when you, as you say, took out this policy, until March 1st when the fire occurred? A. Will you repeat that?

The Court: I don't think the witness understood the question. Rephrase your question, Mr. [24] Crain.

Q. (By Mr. Crain): Did you change any of the contents in your house between October, 1959, and March 1, 1960?

A. I didn't change but I moved in some of my things. I have some other things that I move in.

Q. What were those things that you moved in?

A. Mr. Crain, I can't remember all my things.

Q. Mrs. Santos, you remember that several years ago you paid $267.50 for a G.E. Refrigerator.

A. Yes.

Q. Now you don't remember items of furniture or personal effects that you may have moved in or or out of this house the last six months prior to the fire, is that right? A. (No response.)

(Testimony of Luisa B. Santos.)

The Court: Do you understand the question, Mrs. Santos?

A. I just list what Aquino told me was important for me to list for him as he told me that those are the things that are not in the policy.

Q. (By Mr. Crain): That is not an answer to my question, Mrs. Santos. The question is very simple. What did you move into that house between October, 1959, and March 1, 1960?

A. I have quite a few things that I move in there from the store that I used to run but I quit running the place over there, like this other dining table.

Q. We already have that included.

A. No, it is not that, but as to what Mr. Aquino told me.

Q. We are not worrying about what Mr. Aquino told you, we are asking you a simple question. What did you move into that house between October, 1959, and March 1, 1960? [25]

A. I don't remember.

Q. You moved the dinette set, you told us. Is it the one worth $50 or the one worth $25?

A. I don't remember.

Q. You don't remember. You remember moving any items of furniture out of that house between October, 1959, and March 1, 1960? A. No.

Q. You didn't move any? You didn't move a Amana Freezer out of the house?

A. That was moved before I moved up there.

Q. That was moved before you moved up there?

(Testimony of Luisa B. Santos.)

A. Yes.

Q. That was not included in your evaluation of the value of your property at the time you insured it, is that right?

A. It was included on the policy but I didn't include that down because I told the adjuster it wasn't working——

Q. It was——

The Court: Finish your answer.

A. It was moved out before the fire.

Q. (By Mr. Crain): But it was moved out after the insurance policy was written, wasn't it?

A. Yes.

Q. Now is that the only item that was moved out of the house after the insurance policy was written and before the fire? A. That's all.

Q. Did you own that freezer?

A. Yes. [26]

Q. You didn't owe anybody any money on it?

A. No.

Q. What did you do with it?

A. They took it to have it fixed.

Q. Who took it?

A. A guy by the name of Antonio Cruz.

Q. Do you have that freezer now? A. No.

Q. He never brought it back?

A. It is not fixed.

Q. Did you have an automobile at your house at the time of this fire? A. No.

Q. Why?

The Court: Mr. Crain——

(Testimony of Luisa B. Santos.)

Mr. Barrett: Your Honor, why she didn't have any automobile there, I can't see that has any bearing on the issue.

The Court: I think that is going a little far on cross-examination.

Q. (By Mr. Crain): Mrs. Santos, you have testified that you were living with a Mr. Gregorio Sanchez, is that right? A. Yes.

Q. How old are you?

A. Thirty-eight.

Q. How old is Mr. Sanchez?

A. About 27 or 28.

Q. Now how many years have you been living together? A. About three years. [27]

Q. You been living together since before you built this house, isn't that right? A. Yes.

Q. Where does Mr. Sanchez work?

A. Now or before?

Q. Where did he work in October, 1959?

A. Commercial Port.

Q. Where does he work now?

A. Commercial Port.

Q. Where did he work in 1958?

A. Public works.

Q. He has been employed ever since you have been living together, is that right? A. Yes.

Q. Now, Mrs. Santos, does Mr. Sanchez own this house or any part of it? A. No.

Q. Did he own any part of the personal property that was in that house? A. No.

(Testimony of Luisa B. Santos.)

Q. He contributed nothing to the purchase of any of this property at all, is that right?

A. He did bought some but he gave them to me.

Q. He bought it and gave it to you?

A. Yes.

Q. Did he buy any of the materials that went into the house? A. No.

Q. Did he do any of the work in constructing the house? [28] A. Some.

Q. Some. So Mr. Sanchez, what does he do around the house, does he contribute anything to the maintenance of the household?

A. Do I have to answer that?

Q. You brought Mr. Sanchez into this case, I didn't.

The Court: Let's not argue with the witness.

Mr. Crain: I am not arguing.

The Court: You answer the questions and if I feel as though the questions should not be answered, I will rule at that time.

Q. (By Mr. Crain): Please answer the question.

The Court: Read the last question. Read the last two questions.

(Last two questions read back by the Reporter.)

The Court: Do you understand the question, Mrs. Santos?

A. Yes.

Q. (By Mr. Crain): What does he contribute?

(Testimony of Luisa B. Santos.)

A. When he get paid, he give me some of the money and I go out and buy with it.

Q. Has that been true ever since he has been living with you?

A. Beg pardon? No, not all the times.

Q. You mean sometimes he gives you money and sometimes he doesn't? A. Yes.

Q. Did he ever give you money to buy any of this furniture, these fixtures, that you listed here that were destroyed in this house? [29]

A. Yes.

Q. Now, isn't it a fact, Mrs. Santos, that practically everything that you have in that house you have bought on rather long-range installment payments, isn't that true?

A. I don't understand.

Q. The 12-piece rattan set that you said that you purchased two and a half years before the fire, now actually you bought that rattan set in 1956, did you not? A. I think so, I don't remember when.

Q. You don't remember whether it was two and a half years old or four years old, is that right?

A. No, it was two and a half years old.

Q. Didn't you buy it in 1956 from Ada's?

A. Like I said, Mr. Crain, I don't remember the year, but as I estimated it approximate about that time.

Q. You bought it on installments, did you not?

A. Installment.

Q. Now who made the installment payments,

(Testimony of Luisa B. Santos.)

did you make all of them or did Mr. Sanchez make some of them?

A. Mr. Sanchez made some of them.

Q. He made some of them. Did he make half of them? A. That I can't explain.

Q. You can't explain? A. No.

Q. Can you tell us on the average what Mr. Sanchez makes a week or a month?

A. I can't answer, I don't know.

Q. You don't know. Can you tell us how much money, [30] approximately, Mr. Sanchez has given you or contributed to your household per year during the past three years?

A. I don't remember.

Q. You have no idea? A. No.

Q. You testified that you had a G.E. Range that was two and a half years old? A. Yes.

Q. You testified that you paid $285 for it?

A. Yes.

Q. And that you valued it at the present time at $200? A. Yes.

Q. And that it was not paid for? A. Yes.

Q. Who do you owe the money to?

A. Marelco.

Q. Is that Marianas Electric & Supply Company? A. Yes.

Q. I believe you testified the refrigerator was two and a half years old? A. Yes.

Q. That you paid $267.50 for it? A. Yes.

Q. How did you remember that figure so well, Mrs. Santos?

(Testimony of Luisa B. Santos.)

A. I was working for the company at the time.

Q. And you valued that G.E. Refrigerator at $150 at the present time? A. Yes. [31]

Q. And it is not paid for? A. No.

Q. How much do you owe on each of these items at the present time?

A. I can't explain that because they were all in one contract.

Q. The two items were on one contract?

A. Yes.

Q. Are they still in that one contract?

A. I don't know whether they still have them.

Q. You just testified that you worked for Marianas Electric & Supply Company, how long did you work there? A. Over a year.

Q. Can you tell us why you left their employment?

Mr. Barrett: I think this, your Honor, is outside the scope of the issues. I will object to it.

The Court: What is the purpose of your question, Mr. Crain?

Mr. Crain: I will withdraw the question at this time and come back to it later.

Q. (By Mr. Crain): Had you purchased any furniture from Pacific Furniture Company in Agana, of any kind?

A. Which is Pacific Furniture? No.

Q. You haven't? A. No.

Q. Did you ever purchase a TV set?

A. No.

Q. You never owned a TV set?

(Testimony of Luisa B. Santos.)

A. One from Marianas Electric. [32]

Q. When did you purchase that?

A. I think I have that in '57 or '58.

Q. What happened to it?

A. When I move up to Merizo, we can't use the TV over there so I request them to take it back.

Q. Did you ever own an Admiral Refrigerator?

A. Yes.

Q. Where did you purchase it from?

A. Dumont.

Q. That is the Radio Center over here on Marine Drive? A. Yes.

Q. Did you also purchase a TV set from them?

A. Yes.

Q. Were those in the house in October of 1959?

A. No.

Q. Were they ever in the house after that day?

A. No.

Q. Where were they?

A. They were down in Agat.

Q. In Agat? A. Yes.

Q. You were maintaining two households?

A. My house in Merizo used to be rented and I was living in Agat.

Q. Was your house in Merizo rented to someone else in October, 1959, when you took out this insurance? A. Yes.

Q. You weren't living in it then at all? [33]

A. No.

Q. Did you tell the agent that you had mentioned here that you were not living in the house?

(Testimony of Luisa B. Santos.)

A. Yes.

Q. Who was living in the house in October, 1959? A. A serviceman.

Q. What was his name?

A. Dickson Fields.

Q. Did you ever buy any furniture from a Mr. Engle? A. Yes.

Q. Was any of that furniture ever in this house?

A. Yes.

Q. Was it burned in this fire? A. Yes.

Q. Was it paid for? A. No.

Q. What was its value and what was it?

A. Seventy-two, fifty.

Q. What item was it? A. Dining table.

Q. You mean one of the dinette sets?

A. Yes.

Q. Is that all that you bought from Mr. Engle?

A. Just the dinette set.

Q. Now, actually, you don't remember when you purchased most of this property, do you?

A. Which property?

Q. The 12-piece rattan set, do you know what year you bought [34] it in?

A. It was somewhere around '56 or '57.

Q. Well, it was in 1957, wasn't it?

A. I can't remember.

Q. You valued it, you say you paid $329.95 for it? A. Yes.

Q. You estimate its value at the time of the fire $250? A. Yes.

Q. That is a very low depreciation. Can you ex-

(Testimony of Luisa B. Santos.)

plain to us why that set remained so valuable although it was that age?

A. It still looks like new and I have taken care of it. I just value that as to my own knowledge, I don't know.

Q. Now the G. E. Refrigerator, which is not as old as the rattan set, is it? It is newer, isn't that right? A. I think so.

Q. You depreciated it from $267.50 to $150. Why such a greater amount of depreciation?

A. Well, I have been in some of these second-hand stores and I have observed how they sell the second-hand.

Q. And that is your only basis for valuing the refrigerator? A. Yes.

Q. Now you mentioned a nara set. Is that a living room set? A. Yes.

Q. Is that newer than the rattan set?

A. It is older than the rattan set.

Q. It is older, how much older? [35]

A. It is six months.

Q. It was purchased in 1955 or 1956, then, is that right? A. Yes.

Q. How old were the bed sheets that you had in the house?

A. I can't say they are too old because every now and then I buy one.

Q. You remember how much you paid for them?

A. I only paid two-some, $1-some, three-some.

Q. Let's say you paid two-some; you had ten sheets; that would be $25 new, wouldn't it, if you

(Testimony of Luisa B. Santos.)

paid $2.50 apiece, right? A. I don't know.

Q. So would you say that your sheets that you had have a maximum value of $25?

A. When they are new?

Q. Yes. A. About that.

Q. But these were not new, they were of varying age. A. Some new.

Q. All right, how many pairs of pillow cases?

A. About 12.

Q. What would they cost new?

A. About fifty cents apiece—no, $1-some.

Q. And you had about 12, so we would say about $15 for them. That is $40 for the sheets and pillow cases. Now how many bedspreads are we speaking of? A. Five.

Q. How much are, how much were they new?

A. Some is eight-some, five-some and [36] six-some.

Q. What were they worth at the time of the fire, Mrs. Sanchez? None of them were new, were they? A. I have two of them unused.

Q. Two unused? A. Yes.

Q. All right. All right, say they are worth $15, what are the used ones worth?

A. I don't know.

Q. What was the actual value of the dresses that you had in the premises at the time of the fire?

A. I can't answer that, Mr. Crain, due to the prices of the dresses are different.

Q. The ages were different too, were they not?

(Testimony of Luisa B. Santos.)

Some were older than others? A. Oh, yes.

Q. You didn't have 15 new dresses in the house, did you, Mrs. Santos? A. No.

Q. How many new dresses did you have that hadn't been worn? A. Three.

Q. How much did they cost you?

A. Twelve ninety-five.

Q. Each? A. No, one is $7.95.

Q. And the third one?

A. The other one is—I can't remember all the prices of them.

Q. Now was the price higher or lower than the two named? [37]

A. Sometimes I paid $19 for a dress.

Q. I am not talking about——

A. For a dress.

Q. You surely remember the three new dresses you had at the time of the fire that weren't worn. You told us one cost $12.95 and one cost $7.95. Can you tell us whether the other was more expensive or less expensive than those two?

A. About $9.95.

Q. About $9.95. The other 12 dresses were all used? A. Yes.

Q. Did they mostly, when they were new, fall in this same price range? A. Some cost more.

Q. Did some cost less? A. Some cost less.

Q. And some of them were quite old, were they not, several years old? A. No.

Q. How old was the oldest one?

A. About eight months.

(Testimony of Luisa B. Santos.)

Q. You didn't have any dress in the house over eight months old, is that right?

A. I have some, but those are rags over there which I don't count them for dresses.

Q. They are rags. Now you said your daughter had about 15 dresses also? A. Yes.

Q. How many of them were new? [38]

A. She has five new ones.

Q. Five new ones that had never been worn?

A. Yes.

Q. How long before March 1st did you purchase them? A. I think after the New Years.

Q. Did you buy them all at one time?

A. No, one at a time.

Q. But she never wore them, she had never worn them? A. No.

Q. Can you tell us about what you paid for them? A. I don't remember.

Q. You tell us approximately what you might have paid for them?

A. I think the highest is $12.95.

Q. Twelve ninety-five, down? A. Yes.

Q. Now she had ten used dresses there, then?

A. Uh huh.

Q. Were some of them fairly old or were they all practically new?

A. They were all practically new.

Q. Did they fall into this same general price range at $12.95 or less? A. Some less.

Q. Some less. Now you said five pairs of shoes?

A. Yes.

(Testimony of Luisa B. Santos.)

Q. Those were your shoes? A. Yes. [39]

Q. Were they all new? A. No.

Q. Were some of them well used? A. No.

Q. You mean they were all practically new?

A. Yes.

Q. What are the prices of those shoes?

A. Six ninety-five.

Q. That a good average for the shoes? Is that about the average you paid for new shoes?

A. Yes.

Q. You say they were all practically new?

A. Yes.

Q. You have no old shoes?

A. I have some that had not been used.

Q. Now what would you value the other children's clothing at at the time of the fire, the ones that we have not discussed here?

A. I would value the baby's clothes about $25 to $30.

Q. And then which other child, what is the other child, what's its age? A. Twelve.

Q. Twelve. It is a boy? A. Girl.

Q. You have a 13-year-old girl and 12-year-old girl?

A. The 13-year is married and the 12, she is mine and she was sent over by the parents.

Q. She has no clothing? [40]

A. She has some.

Q. That did not belong to you, did it?

A. No.

Q. Now I believe you said you had 24 towels,

(Testimony of Luisa B. Santos.)

two dozen towels, isn't that what you told Mr. Barrett? A. Yes.

Q. Were they all new? A. No.

Q. Would you tell us about what they cost when they were new?

A. Some is 99c, some is a dollar some.

Q. Say a dollar average would be pretty fair?

A. About.

Q. But they were all used?

A. No, some is used.

Q. How many were unused? A. Six.

Q. Six new ones, the rest were, had been used for some period of time, had they? A. Yes.

Q. Now what else do you include in this lump sum of clothing, bed sheets, pillow cases, etc., towels and shoes? Have you enumerated everything that you can think of or are there other items you want to tell us about? A. That's all I have.

Q. The itemization you have given me covers everything, is that right?

A. I didn't put in the curtains. [41]

Q. Shall we put the curtains in now. Were they new? A. No.

Q. How much did they cost you?

A. I don't know.

Q. Huh?

A. I don't remember because I bought them by yards and I made them myself.

Q. Well, would you say you had $10 worth of material or more? A. About that.

Q. About $10. And that about covers the unitem-

(Testimony of Luisa B. Santos.)

ized property, is that right? A. Yes.

Q. Now you testified that you had these encyclopedia for three years and that you placed a current value on them at $200, although you paid $269 for them three years ago. Isn't that a very high value to place on out-of-date encyclopedias?

A. I don't think so because they are still new.

Q. They are still new. Where did you buy the Reno Ware? A. John Ada.

Q. Did you buy that on the installment plan?

A. Yes.

Q. Is it paid for? A. Yes.

Q. That was purchased in Ada's?

A. I don't know, but he is the salesman that is going around.

Q. Shortly before, shortly before this fire, Mrs. Santos, [42] did you make a sworn statement in order to turn your real estate that is in your name in Merizo into a homestead?

A. I beg your pardon?

Q. Did you make a sworn statement sometime in February, 1960, as to the value of your real estate in Merizo? A. Yes.

Q. You did? A. Uh huh.

Q. Can you tell us what you valued the real property at in the sworn statement?

A. The value in the Government of Guam is three——

Q. No, I am asking you what you valued it at in your sworn statement made in February, 1960?

(Testimony of Luisa B. Santos.)

A. I just picked that up from the asset value, $3000 some.

Q. You made a sworn statement, did you not?

A. Yes.

Q. And you valued the property at $3210, is that right? A. Yes.

Mr. Crain: I have no further questions.

The Court: Counsel have any further examination?

(Counsel approached the bench, discussion off the record.)

The Court: This witness has used a list to refresh her recollection as to the items that she alleges she lost in this fire, approximately the age of the items and approximately what she paid for them and the value she placed on them at the time of the fire or the loss. Counsel has stipulated that they have no objection to the introduction of this list showing, it is sort of a total list of items. I realize the jury has made no notes as [43] to these various items and the amounts and the defense does not agree as to the values of the items, but the Court is asking counsel to introduce this list purely as a guide or as assistance to the jury in determining the items which this witness has testified to as to the age, amount, the cost and the value of the items at the time of the loss. Is that satisfactory to counsel?

Mr. Barrett: Yes.

Mr. Crain: Yes.

(Testimony of Luisa B. Santos.)

The Court: Very well, would you hand the bailiff that list, Mrs. Santos?

(So done.)

The Court: It may be introduced by stipulation of counsel and marked Plaintiff's Exhibit No. 3.

(At this time a certain document was marked Plaintiff's Exhibit No. 3, in evidence.)

Mr. Barrett: Just one or two questions, Mrs. Santos.

Redirect Examination

By Mr. Barrett:

Q. Did you own the house in Merizo that we have been talking about, the one that burned?

A. Yes.

Q. Did anyone have any liens against it that you know? A. No.

Q. What happened to the insurance policy that you received? A. It was burned down.

Q. Have you ever seen a copy of the policy since then? A. No.

Mr. Barrett: That's all. [44]

Recross-Examination

By Mr. Crain:

Q. Can you tell us how you were able to make your sworn statement in proof of loss, which is Exhibit 2 here, if you never saw a copy of the policy again? A. Will you repeat?

(Testimony of Luisa B. Santos.)

Q. I think the question is perfectly clear.

The Court: Read the question, Mr. Reporter.

(Last question read back by the Reporter.)

The Court: I don't think the witness understood the question, Mr. Crain.

Q. (By Mr. Crain): Mrs. Santos, you had an opportunity to look at Exhibit 2 here, the proof of loss that was signed by you? A. Yes.

Q. Can you tell the Court how that was filled out if you did not have access to the copy of the policy?

A. Mr. Aquino gave me one to give to Mr. Barrett, but I don't look at the Barrett—the paper. I don't know whether that is the copy, I am not sure whether that is the policy or what. I don't open the paper, it was folded.

Q. Well, at least you are now testifying that Mr. Aquino did cooperate with you to a certain extent. A. Will you repeat?

Q. I say Mr. Aquino did cooperate with you, then, to a certain extent, even though you don't know what he might have done for you.

A. I don't know.

Q. You testified a moment ago there were no liens against [45] the real estate, is that right?

A. Yes.

Q. Are there any now?

Mr. Barrett: I think that is irrelevant.

The Court: I think so, too.

Mr. Crain: I will ask another question.

(Testimony of Luisa B. Santos.)

Q. (By Mr. Crain): Isn't it a fact there was a lien against the real estate even before you filed the homestead?

Mr. Barrett: I think that is also irrelevant.

The Court: Wait just a minute.

Mr. Crain: Mr. Barrett asked the question.

Mr. Barrett: I said at the time of the fire.

The Court: What was your question?

(Last question read back by the Reporter.)

The Court: I will sustain the objection to that question.

Mr. Crain: If the Court please, counsel made an objection. I will strike that and ask a different question.

The Court: All right, you can withdraw the question and reframe your question, Mr. Crain.

Q. (By Mr. Crain): You stated to Mr. Barrett there were no liens against the real estate of any kind at the time of the fire, isn't that right? Is it not correct that there existed, at the time of this fire, a judgment against you in this court in Topsy's Liquor Company v. Luisa B. Santos in the amount of $3000? A. No.

Q. That is not true? A. No.

Q. That is Case No. 56-56 in this court, there is no such [46] case? A. No.

Q. Isn't it true that there was a judgment in this court at the time of that fire in the case of Marianas Electric & Supply Company v. Luisa B.

(Testimony of Luisa B. Santos.)

Santos in the sum of excess of $3,000, or thereabouts? A. Yes.

Q. And those existed at the time of that, that existed at the time of the fire, did it not?

Mr. Barrett: Your Honor, I object to these questions unless Mr. Crain can show there was an abstract of judgment.

The Court: I think it is proper cross-examination.

Mr. Barrett: The judgment does not lien against the real property unless there is an abstract.

The Court: I didn't hear.

Mr. Barrett: A judgment isn't a lien against real property unless an abstract has been filed.

The Court: I don't know whether it has or has not. That is a preliminary question. I don't know whether Mr. Crain will attempt to show that and whether or not the testimony will amount to, what it will amount to.

Q. (By Mr. Crain): Isn't it a fact there was a judgment in the Island Court of Guam in the case of Atkins-Kroll against Luisa B. Santos at the time of this fire? A. Yes.

Q. Yes? A. Yes.

Q. And isn't it a fact there was a judgment in the Island [47] Court of Guam in the case of Jones & Guerrero Company v. Luisa B. Santos at the time of this fire? A. Yes.

Mr. Crain: Thank you. I have no other questions.

(Testimony of Luisa B. Santos.)

Mr. Barrett: Would you mark that as an exhibit?

(At this time a certain document was marked Plaintiff's Exhibit No. 4 for identification.)

Re-redirect Examination

By Mr. Barrett:

Q. Mrs. Santos, I am going to hand you a document marked Exhibit B, or Exhibit 4 for the Plaintiff, and ask you if you can identify it? Have you ever seen that document before?

A. I have seen the address but the contents I don't remember.

Q. You pointing at the top? A. Yes.

Q. What did Mr. Aquino give you?

Mr. Crain: I object to this. This is a leading question, highly improper.

The Court: What is the document that you have presented to the witness?

Mr. Barrett: It is a photostatic copy of the insurance binder.

The Court: Insurance binder. Is this rebuttal testimony?

Mr. Barrett: Yes.

The Court: What is the purpose of this testimony?

Mr. Barrett: To determine whether or not this is the document Mr. Aquino gave to her after the fire. [48]

Mr. Crain: She testified very definitely she

(Testimony of Luisa B. Santos.)

didn't receive that; that it was a folded piece of paper and she didn't know what was in it and so I don't know how she could identify this.

The Court: Go ahead, ask your question and see if you can identify it. If you cannot, if it is objected to——

Q. (By Mr. Barrett): Could you answer the question? Can you or can you not identify that paper in your hand?

A. I can identify the National Union Fire Insurance Company.

Q. No, just the top. Well, I will withdraw the question.

The Court: Any further questions of this witness?

Mr. Crain: I have none.

The Court: You may be excused, Mrs. Santos.

Mr. Barrett: The plaintiff rests.

The Court: The plaintiff rests. Mr. Crain.

Mr. Crain: If the Court please, it being this near noon, I would prefer to start the defense after lunch.

The Court: At one. The plaintiff has rested the case at this point and counsel for the defense has suggested that he be given until this afternoon to prepare the opening, or his presentation, and at this time we will go to lunch and I will ask you to report back in the jury box at 1:30. Now during the lunch period, again I must admonish you not to talk this over among yourself or with anyone else. If anyone should talk with you on the outside

(Testimony of Luisa B. Santos.)

about this case or ask you any questions, you make it known the fact that you are sitting on the jury and you are instructed you cannot discuss the case in any way. We will go to lunch now and recess until 1:30. Be back promptly at 1:30, please.

(Whereupon, court was recessed at 11:45 a.m.) [49]

Afternoon Session—1:30 P.M.—Trial Resumed

The Court: Let the record show that all jurors are present in the jury box and counsel for the plaintiff and defendant. Now we will proceed. Mr. Crain, you wish to make your opening remarks?

Mr. Crain: If the Court please, if we could come to the bench, I would like to make a motion without sending the jury out.

The Court: Very well, will counsel approach the bench, please.

(Counsel and Reporter approached the bench where the following transpired out of hearing of the jury:)

Mr. Crain: At this time I would like to move that the complaint on file be dismissed on the ground that it is based upon an alleged sworn proof of loss which is contrary to the terms of the policy being sued upon, both of these items, the proof of loss and the policy having been introduced, identified and marked a part of the evidence of the plaintiff. That is all.

(Back in open court.)

(Testimony of Luisa B. Santos.)

Mr. Crain: Call Mrs. Santos, please, as an adverse witness.

The Clerk: You are advised that you have been previously sworn and are still under oath.

LUISA B. SANTOS

the plaintiff herein, having been previously duly sworn and examined, returned to the stand, was examined and testified as follows:

Cross-Examination

By Mr. Crain: [50]

Q. Now, Mrs. Santos, you testified here this morning that prior to your securing the assistance of an attorney, you were dealing with a Mr. Aquino at Underwriters Adjustment Company, is that right? A. Yes.

Q. I believe you testified that prior to your contacting an attorney, that Mr. Aquino, you say, told you that your $2000 evaluation of your personal property was perfectly all right with him and that he would accept it, is that right? A. Yes.

Q. And I believe that you also testified that prior to the time that you contacted an attorney, that Mr. Aquino also told you that he would offer you $4000 for the house, is that right?

A. That's right.

Q. So Mr. Aquino offered you a total of $6000, is that right? A. That's right.

Q. Now at the time you retained an attorney,

(Testimony of Luisa B. Santos.)

did you tell your attorney that Mr. Aquino had offered you $6000? A. Yes.

Q. Did you very definitely tell your attorney that Mr. Aquino had offered you $6000?

A. I tell Mr. Barrett, I don't think he quite understand me because I told him that the building was for $4000.

Q. You don't think Mr. Barrett understood you?

A. I don't think so.

Q. And you weren't able to make Mr. Barrett understand you at the time you talked to him, then, is that right? [51]

A. The second time I was there, I told him that he was offering $6000.

Q. When was that?

A. I don't remember the date.

Q. How long after the fire, Mrs. Santos?

A. It was before the first time they set the first trial and it was——

Q. You mean you waited until after Mr. Barrett had filed the suit to finally tell him Mr. Aquino had offered you $6000? A. No, before that.

Q. Well, when did you first tell your attorney what Mr. Aquino had offered you?

A. I don't remember the date.

Q. But you didn't tell him the first time or you knew he didn't understand you, is that right?

A. I told him but I don't think he quite understand me.

Q. Why don't you think he quite understood you?

(Testimony of Luisa B. Santos.)

A. Because the second time I was there, he told me that it was $4000 and that is the time I told him it was $6000, $4000 for the house.

Q. Well, when were you there the first time, then?

Mr. Barrett: Your Honor, I fail to see the relevancy of this line of questioning, Mr. Crain trying to impeach me or show I didn't understand my client. What is he trying to bring out?

Mr. Crain: If the Court please, if Mr. Barrett wants to testify in the case, it will be much simpler if he wants to identify his own letter and I will ask to have it introduced in evidence and I won't have to ask his client any more questions. [52]

The Court: What you trying to show?

Mr. Crain: I am trying to show this woman said this morning she had informed her attorney she was offered $6000; the attorney wrote the letter and said nothing but $4000 had ever been offered.

The Court: What difference does it make?

Mr. Crain: I think it makes a difference as to the representations that these people are making to the jury as to the honesty and the intentions of the parties that they were dealing with.

The Court: Well, we have two questions here. We have a policy of insurance which carries $8000 on the real property and $2000 on the personal property. The question has been raised as to the validity of the, or the sufficiency of the proof of loss as filed by the insured. This witness has testified that at the time of the loss the investigator

(Testimony of Luisa B. Santos.)

from some insurance company or some Government or some Governmental official, either a district or, rather, a Village Commissioner, visited the scene and told her to get in touch with the insurance company and to make out the reports. The testimony is that she had some conversation with a Mr. Aquino and gave Mr. Aquino certain information and that she also testified that she went to Mr. Barrett's office, at which time a proof of loss was made out for her signature and it was admitted. Now the question of what she told Mr. Aquino or what she told anyone else as to the value of the real estate, we think that, the oral testimony is going to change that.

Mr. Crain: This is not what she told Mr. Aquino, it is what Mr. Aquino told her.

The Court: What difference does it make what Mr. Aquino [53] told her? She has filed a proof of loss and the proof of loss is what has been introduced in evidence. The meaning of the proof of loss, or, that is something that probably you would like, if you don't understand, would want to go into or the company would have the right to go into it, and had time to go into it, from the date of the filing with the company.

Now the testimony at this point, what this witness, the plaintiff had conversations with her attorney and various and sundry things, I don't see the materiality of it unless you are laying a foundation to impeach this witness.

Mr. Crain: Mr. Barrett said he had no objec-

(Testimony of Luisa B. Santos.)

tion to the introduction of this letter, and with that I will not question this witness any further.

The Court: You presenting that?

Mr. Crain: Yes.

Mr. Barrett: No objection, your Honor.

The Court: Let me see the letter.

Mr. Crain: And I have no further questions then of this witness.

The Court: There being no objection, this letter from W. Scott Barrett to Mr. Johnny Aquino dated March 24, 1960, may be introduced in evidence and marked Defendant's Exhibit A in evidence.

(At this time a certain document was marked Defendant's Exhibit A, in evidence.)

Mr. Crain: I have no other questions of Mrs. Santos.

The Court: Do you have any questions?

Mr. Barrett: No questions. [54]

The Court: You may step down.

Mr. Crain: If the Court please, at this time I would like to call Mr. Gregorio Sanchez, who is in the courtroom.

The Court: Mr. Sanchez, very well.

GREGORIO SANCHEZ

called as a witness here by and upon behalf of the defendant, being first duly sworn, was examined and testified, as follows:

The Clerk: Will you kindly state your name?

Mr. Sanchez: My name is Gregorio Sanchez.

Mr. Crain: If the Court please, I am calling this witness under Section 2055.

The Court: 2055?

Mr. Crain: 2035—2055, two-zero-five-five, of the Code of——

The Court: The Penal Code of Guam.

Mr. Crain: The Code of Civil Procedure.

Cross-Examination

By Mr. Crain:

Q. Will you state your full name, please.

A. My name is Gregorio Sanchez.

Q. Where do you live?

A. I live, at present, in Agat.

Q. Where in Agat?

A. At the old Agat Village.

Q. You know what lot you live on?

A. There is no lot down at that place, they are not divided by lot. [55]

Q. Who do you live with?

A. Pardon me, sir?

Q. Who do you live with?

A. I live with my nephew and the girl, Mrs. Santos.

Q. Where were you living on March 1st, 1960?

(Testimony of Gregorio Sanchez.)

A. I was living in Umatac, I mean Merizo.

Q. Who with? A. Pardon me?

Q. Who with, or with whom?

A. With Luisa B. Santos.

Q. How long had you lived with Luisa B. Santos?

A. Up to now, for almost three years.

Q. Where do you work?

A. I work at the Department of the Commercial, I mean the Commercial Port of Guam.

Q. What do you do?

A. I was a cargo checker.

Q. You are a cargo checker? A. Yes, sir.

Q. How much do you make?

A. That I cannot tell you the exact amount.

Q. How much do you make per hour, Mr. Santos? A. One dollar, fifteen an hour.

Q. How many hours do you average a month?

A. Well, we only work when there is a ship arrive.

Q. Mr. Sanchez, how long have you been working as a cargo checker?

A. The late part of '59. [56]

Q. Almost a year? A. That's right.

Q. Are you able by now to average what you will make a month in your employment?

A. As I said, sometimes we work eight hours per months, sometimes we work 30 hours in, what I mean, in one month. It is only when the ship arrives. Sometimes the check will amount up to $80, sometimes $30 and sometimes $4.

(Testimony of Gregorio Sanchez.)

Q. Are you speaking of a month now?

A. Pardon me?

Q. Are you speaking of a month or a week when you get your check?

A. A pay check, which is every two weeks.

Q. It can run from $4 a week to $80 a week, is that what you said?

The Court: No, he gets paid twice a month, every pay check.

Q. (By Mr. Crain): It could run from $4 a pay period, then, to $80 a pay period, then, is that right? A. That's right.

Q. That your take-home pay, is that right?

A. That's right.

Q. Now you have deductions made as a single man, is that right? A. No.

Q. As a married man?

A. Will you please repeat that?

Q. How many dependents do you take from your—— A. Four. [57]

Q. Who are they?

A. Those are my children.

Q. By a previous marriage?

A. By a previous marriage, that's right.

Q. No children of Mrs. Santos? A. No.

Q. And the $4 to $80 that you are speaking of is your take-home pay after the deductions are made, is that right?

A. There is no deductions on those checks, as I said.

Q. No deduction? A. That's right.

(Testimony of Gregorio Sanchez.)

Q. Do you contribute to the support of these four children that you are mentioning here?

A. Yes.

Q. How much?

A. If I have some, I was ordered to pay $40 every pay day, but I only give what I got.

Q. How much do you contribute toward the household expenses in the house you live in?

A. Will you repeat that question, please?

The Court: Repeat the question, Mr. Barnes.

(Last question read back by the Reporter.)

The Court: You understand the question? You are now living in Agat. How much do you contribute to the support of that house where you are now living? A. I would say about 50 per cent.

Q. (By Mr. Crain): Fifty per cent of what?

A. Of what I am getting. [58]

Q. Of your gross pay? A. That's right.

Q. Was that true on March 1st, 1960?

A. Pardon me?

Q. Was that same situation true on March 1st, 1960, were you contributing about 50 per cent of your pay? A. Yes.

Q. Was it also true in October of 1959?

A. Yes.

Q. And it was true for a couple of years before that on the other jobs you had, wasn't it?

A. Yes.

Q. Now you heard Mrs. Santos testify here of purchasing furniture, appliances, encyclopedias, cooking ware, and so forth. I think you heard her

(Testimony of Gregorio Sanchez.)

testify that practically all of that merchandise she had bought on the installment plan, isn't that right?

A. Yes.

Q. And she bought that with your knowledge, isn't that right? A. Not all the time.

Q. You mean sometimes she bought it without your knowing about it? A. Yes, that's right.

Q. When it came in the house, you knew it was there, didn't you? A. That's right.

Q. And you made payments, you made some of the payments on all these items, didn't you? [59]

A. That's right.

Q. From your earnings?

A. Mr. Crain, I was working and sometimes I was rais——

Q. Sometimes you were working.

A. I was working and sometimes I was farming, I was raising poultry and pigs and that is where I get my income.

Q. You had additional cash income from your farming, is that right? A. That's right.

Q. And from that you also made payments on these furnitures, appliances, so forth, is that right?

A. Sometimes.

Q. In fact, you had most of the cash income in that household, didn't you, Mr. Sanchez?

A. No, I can't say that since most of those furnitures were bought before I even know Miss Santos.

Q. Oh, is that right? A. That's right.

Q. They were bought over three years ago?

(Testimony of Gregorio Sanchez.)

A. Pardon me?

Q. They were bought over three years ago, then?

A. I can't answer that question when she bought them.

Q. You testified a little earlier you had lived with her for three years, is that correct?

A. Yes, I live with her for almost three years, that is what I said.

Q. All right, now how long did you know her before you started to live with her? [60]

A. Well, a long time ago I used to know them.

Q. But you say she bought all these things before you started to live with her, is that right?

A. Not all of them, some of them.

Q. Can you tell us which?

A. Like the double beds.

Q. You say "double beds," how many double beds are there?

A. Double bed, I'm sorry if I make it wrong.

Q. You say that was bought before you knew her, is that right?

A. I know her ever since I was living in Umatac.

Q. Well, let me rephrase that, then. She bought the double bed before you went to live with her, is that what you mean to say? A. That's right.

Q. All right, what else?

A. Like the refrigerator.

Q. Which, the General Electric Refrigerator?

A. Yes.

Q. Now that was bought before you went to live

(Testimony of Gregorio Sanchez.)

with her, is that right? A. Right.

Q. What about the Admiral Refrigerator, was that bought after you went to live with her?

A. That is after.

Q. That is after. Now on some of these conditional sales contracts, these purchases of furniture and other items, you cosigned the papers on those, did you not? A. No, I don't. **[61]**

Q. You never cosigned any of them?

A. Nope.

Q. None at all?

A. None that I can remember.

Q. Well, now, it has only been three years, Mr. Sanchez, can you give us a definite answer: Did you ever cosign any paper with her on any property at all? A. None that I can remember.

Q. No automobiles, no refrigerators, no TV sets, nothing? A. Right.

Q. Nothing at all? A. Right.

Q. You never signed your name on a piece of paper with Miss Santos? A. Right.

Q. Is that right? A. Right.

Q. But you have contributed to the payments on much of this property that was destroyed in this fire, isn't that correct?

A. In some of the property, yes.

Q. Now who built that house?

A. Pardon me?

Q. Who built the house that burned down?

A. Who built?

Q. Uh huh.

(Testimony of Gregorio Sanchez.)

A. A carpenter by the name of Vicente—Jose Tapasna.

Q. He the only person that worked on that house?

A. I worked and some free labor, free [62] hands.

Q. Where did the material come from?

A. It came from various stores in Agana.

Q. Was it all new material?

A. Approximately all new.

Q. All new roofing? A. Right.

Q. Roofing iron, everything all new. It came from various stores in Agana? A. Right.

Q. Did you buy any of it?

A. Pardon me?

Q. Did you buy any of it? A. Some.

Q. Can you tell us what you bought and where you bought it?

Mr. Barrett: Your Honor, this has gone on for a long time and I fail to see the relevancy of what Mr. Crain is driving at, what went into the house, where the materials came from. The house, it has been testified, belonged to Mrs. Santos. If he can prove it doesn't belong to her, that is something else.

Mr. Crain: I think we are entitled to inquire into it. I am not sure who any of this property belongs to at the moment.

The Court: You lay your foundation. Do you know that she did not, the insured did not own the real property?

(Testimony of Gregorio Sanchez.)

Mr. Crain: Perhaps she didn't own the sole interest in it and especially the personal property.

The Court: I am going to limit your questions of this witness, if you intend to lay a foundation that someone else owns the personal property other than the witness. As far as the real [63] property is concerned, that speaks for itself, is a matter of record and the proof of loss and policy, the real property, itself. If it can be shown you are putting this witness on the stand to bring out the ownership of the personal property, that the personal property, this was not owned by the insured, it is owned by someone else, let's get right down to the point.

Q. (By Mr. Crain): Mr. Sanchez, there is a 12-piece rattan set that was in this house. How much money did you contribute toward the purchase of that set?

A. That rattan set, that is I bought that myself.

Q. You bought it yourself?

A. Yes, the rattan set belongs to me only when I bought it, but when it put in the house, it no longer belongs to me, it belong to the owner of the house, Mrs. Luisa Santos.

Q. Once she sat down on it, it didn't belong to you any more? A. When it enters the house.

Q. When it enters the house? A. Right.

Q. We have three table lamps here, did you buy them? A. No, I don't buy them.

Q. Pay anything on them?

(Testimony of Gregorio Sanchez.)

A. I don't remember.

Q. You don't remember. How about the G. E. Refrigerator, did you ever make any payments on it? A. Nope.

Q. Did you ever make any payment on the G. E. Range? A. Nope. [64]

Q. A dinette set, one year old, did you make any payment on that? A. No.

Q. You know where it was purchased?

A. Yes.

Q. Where?

A. The dinette set is the one that cost $72, was purchased at the Island Furniture Market in Anigua.

Q. Is that the one not paid for? A. Yes.

Q. But you didn't pay anything on it at all?

A. No, I don't. At that time Miss Santos was operating the store in Agat.

Q. We have a three-quarter size bed here, do you or did you have anything to do with the purchase of that? A. Nope.

Q. Do you know who did?

A. Miss Luisa Santos.

Q. When did she buy it and do you know where she bought it?

A. No, I don't know that. That is another item before I live with her.

Q. And you say the double bed was bought before you went with her, is that right?

A. The double bed and the three-quarter bed.

Q. What about this nara living room set?

(Testimony of Gregorio Sanchez.)

A. That was bought before I live with her, too.

Q. Ceramics and picture frames and so forth, did you buy [65] any of them?

A. No, I never did.

Q. You never did. Did she have any of them before you went to live with her?

A. Some, and some were bought when we were together.

Q. But you never bought any of them or paid for any of them?

A. It is the custom the girl always buys that kind of things for the house.

Q. The dishes and silver ware, you buy any of them at all?

A. No, I don't, it was there before I, was bought before I lived with her.

Q. Before you lived with her?

A. That's right.

Q. And she says she has only had it two years, then she is wrong, is that right?

A. Pardon me?

Q. When she says she has only had them two years, then she is incorrect in her statement, is that correct?

A. Some silver wares she had them for that long, but there is some silver ware she had it before we even live together.

Q. And the dishes the same way?

A. Some of them.

Q. So she says they are all only two years old, she is wrong, is that right?

A. No, she is right, for some silver wares there.

(Testimony of Gregorio Sanchez.)

Q. If she says all of them are only two years old, is that right? [66]

Mr. Barrett: Object to that, your Honor.

The Court: I think you have gone far enough in that, Mr. Crain. The testimony, as I recall Mrs. Santos' testimony, to the best of her recollection they were bought two and a half, three, four years ago.

Mr. Crain: If the Court please, Exhibit 3 is that list which lists the ages of these things, too.

The Court: She did them by years, approximate years. They varied from one year to five years, as I recall it, maybe four years, two years, three and a half years. So far as this witness' testimony of the furniture, the furniture that was in the house, the item of the 12-piece rattan set was bought by him and his testimony was that when he went in the house, from the time he went in, it was hers and I gather from that, and I probably intend to question on that further, later, that he gave that to her as a gift and it was in the house at the time the policy was issued. He said he has been living with her approximately three years, as I recall his testimony. When he went in to live with her, about three years ago, he bought, he brought with him this 12-piece rattan set that he bought, apparently paid for it or was continuing payment, I don't know exactly which, but he made a bequest with her. His testimony was, When it went into the house it didn't belong to me. That is his exact language on the stand.

(Testimony of Gregorio Sanchez.)

Q. (By Mr. Crain): Can you tell us the date you went to live with Mrs. Santos?

A. I can't recall the date.

The Court: Mr. Crain, maybe I can assist. If you took that Exhibit No. 3 and showed it to this witness and ask him if he can [67] identify any items on that list that he bought and paid for himself.

Mr. Crain: I have gone through everything except the encyclopedias, your Honor, it is a little late.

The Court: All right, let's get to the encyclopedias.

Mr. Crain: I would like for him to answer the question I have asked.

The Court: Very well. Do you know the question?

Q. (By Mr. Crain): When did you go to live with Mrs. Santos?

A. I don't know the exact date.

Q. Do you know the year and the month, approximately?

A. The early part of '58 or late part of '59, that I can't remember.

Q. Did you buy this 12-piece rattan set after you went to live with her? A. Yes.

Q. Did you buy that in 1956 from Ada's Store?

A. I, yes, I bought that from Ada's Store.

Q. Did you hear her testify this morning?

A. Not all of it.

(Testimony of Gregorio Sanchez.)

Q. Did you hear her say she bought the rattan set? A. Yes.

Q. But that is not true, you bought it, is that right? A. I bought the rattan set myself.

Q. And you made all the payments on it?

A. That's right.

Q. Where was Mrs. Santos working on March 1st, 1960? A. March 1st, 1960?

Q. Uh huh. [68]

A. She is not working at that time.

Q. She is not working at that time?

A. Yes.

Q. How long has it been since she worked?

A. Since we got off from the store that we were operating in Agat.

Q. You and she were operating the store together in Agat, is that right?

A. I was helping her but she has the store in her name.

Q. In her name? A. Right.

Q. But it is your store and her store, really.

A. No, it is her store, her name.

Q. What were you doing there?

A. I can be of help.

Mr. Barrett: Your Honor, I am going to object again. I can't see the relevancy of this line of questioning.

The Court: What is the relevancy of this again?

Mr. Crain: These people aren't telling the truth.

I will withdraw the question and ask one other question.

(Testimony of Gregorio Sanchez.)

The Court: Very well.

Q. (By Mr. Crain): Up to this date, you have never cosigned any purchase document with Mrs. Santos, is that right?

A. I have never cosigned, right.

Q. You have never cosigned to purchase an automobile at Crown Motors with Mrs. Santos?

A. Will you repeat that question, please?

Q. Have you ever gone on her note or gone in with her to [69] buy a car from Crown Motors?

A. I bought a car at Crown Motors myself, without her.

Q. Did she cosign the paper?

A. No, she didn't.

Q. When was that?

A. About four months ago, three or four months ago.

Q. And she didn't sign it? A. No.

Mr. Crain: I have no further questions.

Examination by the Court

Q. Mr. Sanchez, did you buy or pay for any other items that were in the house outside of what you testified to, the rattan set? Were there any other items that you bought and paid for in the house at the time of the fire?

A. I can only recall the rattan set.

Q. That is all you bought and paid for?

A. Yes.

Q. Very well. And how much did you pay for that? A. Three hundred and some dollars.

(Testimony of Gregorio Sanchez.)

Q. And when did you buy it?

A. I cannot recall this.

Q. And where did you buy it?

A. At Ada's Store. I was the salesman at the time I bought it.

Q. And did you pay for it by cash or were you paying for it on installments?

A. I paid for it on installments. However, I finish it in [70] a short time because I got the money from my commission.

Q. In other words, the store deducted these payments from your commission on other sales?

A. That's right.

Q. Do you remember when it was fully paid for?

A. It was full, paid full in about three months. I work for Ada as a part-time salesman.

Q. What year was that? A. Pardon?

Q. What year? A. Around '58.

Q. And were you living in the house with Mrs. Santos at the time that this furniture was bought?

A. Yes.

Mr. Crain: If it please the Court, I would like to ask one more question before counsel proceeds.

The Court: Very well.

Cross-Examination
(Continued)

By Mr. Crain:

Q. Were you present when Mrs. Santos purchased the insurance on this house in Umatac?

A. Pardon me?

Q. Were you present when Mrs. Santos pur-

(Testimony of Gregorio Sanchez.)

chased this insurance on the house in Umatac?

A. No, at Merizo you mean.

Q. Merizo, I'm sorry.

A. No, I was not present. [71]

Q. Were you ever present at any time when she talked to Ben Guerrero, the insurance agent who sold her this insurance?

A. No, when we reach the office she usually go in by herself and I stayed in the car.

Q. Mr. Guerrero never saw you?

A. He might have seen me, but we——

Q. You never went into his office and you never went with her at any time when she was negotiating for this insurance?

A. Sometimes we, sometimes I went in that office but not in connection with the insurance policy.

Mr. Crain: Thank you.

Direct Examination

By Mr. Barrett:

Q. Mr. Sanchez, I have handed you Exhibit No. 4, which is the list of the contents Mrs. Santos testified to. Did you, at the time of the fire, own anything on that list, personally?

A. I didn't own anything here since it is in the house already.

Q. It did not belong to you?

A. As far as I am concerned, right.

Mr. Barrett: That's all the questions I have.

Mr. Crain: I have one other question.

(Testimony of Gregorio Sanchez.)

Recross-Examination

By Mr. Crain:

Q. You didn't own a towel, huh?

A. Pardon me? [72]

Q. You didn't own a towel? A. Towel?

Q. Uh huh. A. I don't.

Q. You don't? A. Right.

Mr. Crain: Thank you.

The Court: Finished with this witness?

Mr. Crain: Yes.

The Court: You need him any further?

Mr. Crain: No, your Honor.

The Court: You may be excused.

Mr. Crain: The defense has no further witnesses.

The Court: Mr. Barrett, you have any further testimony?

Mr. Barrett: No rebuttal, your Honor.

The Court: Both sides rest?

Mr. Crain: Yes.

The Court: We will take a—You wish to take a recess before you argue to the jury or you wish to do it now?

Mr. Barrett: I would appreciate a recess.

The Court: Very well, we will take a short recess at this time and, again, I admonish you not to discuss the case yet. When we return from the recess, the attorneys will argue to you and the Court will instruct you and the case will be turned over

to you for a decision. We will take a ten-minute recess.

(Whereupon, a short recess was taken at this time.)

The Court: Let the record show all jurors are present in the jury box, plaintiff and defendant are—counsel for plaintiff [73] and defendant are present in court.

Mr. Barrett, you may proceed with your argument.

Mr. Barrett: Your Honor, members of the jury, I think you will all agree that the issue in this case is not the personal life of the plaintiff. We all do things that aren't approved by everyone. The issue is whether or not she received the policy of insurance which covered her residence and contents against fire. And if so, what the value was.

Now the Judge will instruct you that this policy, which is an exhibit which you can look at, was what is known as a valued policy for the amount of the real property. The face value on the real property is a liquidated and conclusive amount. There is an endorsement attached to the policy which provides, "It is hereby declared and agreed that with respect to the insurance of a building or buildings the within mentioned policy shall be considered a Valued Policy in accordance with the terms of Section 43356 of the Government Code of Guam and the amount for which a premium is charged shall be subject to the provisions of Section 43408 of the Government Code of Guam." So the only real issue is the value of the contents.

I might just call your attention to the section which I believe the Court will instruct you on, "Policies are either open or valued." Section 33456 says an open policy shall not be written on real property. And then the other section that is referred to: "Total loss by fire or miscellaneous insurance: Recovery of full amount. A fire or miscellaneous insurance policy, in case of a total loss of any risk insured under the classes specified in this title as fire or miscellaneous insurance, shall be held and [74] considered to be a liquidated demand against the insurer taking such risk for the full amount stated in such policy, or the full amount upon which the insurer charges, collects or receives a premium; provided the provisions of this article shall not apply to personal property." Applies only to real property. So you will have to determine how much the personal property was worth, what the contents were worth, so on.

Now Mrs. Santos testified she didn't go to the company to get a policy except under the urging of Mr. Guerrero, who has not testified, and that he was the one who suggested the limit, $8000 for the house and $2000 for the contents; that he had been in her house. Certainly there is no misrepresentation of any kind there. I presume that is why we are here contesting this case, because the plaintiff is supposed to have misrepresented in getting this policy in some material respect. But I haven't heard any evidence of it and I don't know that you have.

As to the contents of the house, we have in evidence Exhibit 4, which is the handwritten list Mrs.

Santos testified from. You can look at it, determine whether or not she lost items worth $2000. That is what she was insured for under the policy. If not, it is your prerogative to cut it down on the contents. But I want to ask you whether or not, if your house burned down tonight, you had to present a claim to your insurance company, you could give them an exact itemization of every item in the house, how much it cost, where you bought it and how much it was worth at the time of the fire. I suggest very few of us could do that. Mrs. Santos has not been exact, but I think that is understandable. But you can look at her list and determine for yourself what the value was. **[75]**

I know you will listen to the Court's instructions, which are very important, and that if you listen to them carefully you will decide the facts according to the evidence and you will bring in a verdict for the plaintiff for $10,000, which is the limit of the policy. Thank you.

The Court: Mr. Crain.

Mr. Crain: May it please the Court.

The Court: Mr. Crain.

Mr. Crain: Ladies and gentlemen of the jury, I will not argue at this time about the value of the policy. It is a fact the policy was written on the house for the sum of $8000——

The Court: Excuse me, Mr. Crain. Bailiff, will you close that courtroom door, please.

Excuse me, Mr. Crain, I'm sorry.

Mr. Crain: It is perfectly correct that a policy of insurance was sold to Mrs. Santos and the con-

tents of that will be before you in the jury room. I am not so sure about how the valuation was arrived at, as to the value of the property, and in view of the fact that you will also have before you a proof of loss partially filled out, signed and sworn to by Mrs. Santos, in which she indicates that her personal property, by her testimony, had a value of $5000, that property destroyed in the house on the morning of March 1st, 1960, and that the house itself was worth $12,000. You have here testimony also that she swore, approximately 13 days before this fire, in a document filed with the Department of Records and Accounts of the Government of Guam, that this house was worth $3210. So if we have these discrepancies, I feel that you, ladies and gentlemen of the jury, have the right to look closely into the [76] matter of the value for this personal property. Now the list that you will have before you as Exhibit 4 was made out by Mrs. Santos herself. She shows an acquisition cost of certain items, such as towels and bed sheets, of $1000 and estimated value at the time of the fire of $500. From the details that she was able to give us this morning, it would appear that the new value of all of those items, as she went into detail concerning, would not exceed $500 and that the used value would be whatever value you would place on used sheets, towels, pillow cases, used dresses and used shoes, taking also into consideration the item that she has testified as still being new, taking all of those items that were new, they would not amount to over $150 total. I think that the jury will be entitled to use its

own thinking, in reaching a determination, of the value of the listed property at the time the fire took place. From the testimony that you heard, some of it obviously was somewhat older than is shown by Mrs. Santos on Exhibit 4. The defense feels, and has felt all along, even at the time of the fire, that some of the values placed by Mrs. Santos upon these items were entirely too high and that a more reasonable value could be attached to them. I think that the jury, in evaluating this case, is also entitled to examine the insurance policy to determine what Mrs. Santos' obligations are and were to the company, as well as those of the company to her. Thank you.

The Court: Mr. Barrett.

Mr. Barrett: Mr. Crain commented the defense feels the values were too high and have felt that way all along. The Judge will instruct you that the opinion of counsel is not supported by evidence, is not evidence to be supported or considered by the jury. [77] Now there is no evidence that the defense, the defendant felt that the personal property was too high. In fact, the only evidence in there about the attitude of the defendant is the statement of Mrs. Santos hereself who said when she talked to Mr. Aquino he told her he had no argument at all about the personal property but he thought the house was too high, he could only pay her $4000 upon the house. This was the mistake of Mr. Aquino because under a valued policy, if she, if they insure a house for $8000, they must pay what they insure it for if there is a total loss.

Mr. Crain: I believe this is improper argument.

The Court: I think it is improper. You are encroaching upon the jurisdiction of the Court at this time.

Mr. Crain: Your argument is close——

The Court: The Court will give the law.

Mr. Barrett: I understand that. I am just pointing out the total loss.

The Court: What is it?

Mr. Barrett: Pointing out to the jury there was a total loss.

The Court: You may point out to the jury whether or not there was testimony.

Mr. Barrett: Don't take my word for it, the Court is entirely right; you should listen to the Court's instructions; but there was a total loss, the evidence says there was. There is no contrary evidence and the policy in evidence, you can look at that and see it is a valued policy and the amount written upon the house should be $8000. Listen to the Court's, very carefully to the Court's instructions what you should do in that report. [78]

As to the proof of loss, which is in evidence as an exhibit, I fail to see how the fact that she thought her entire loss was $17,000, being $12,000 on the house and $5,000 on the personal property, should have any relation to the amount of the policy. If she thought it was worth more than $8000, then she was underinsured and the company shouldn't complain.

I hope you will listen to the Court's instructions

as to the terms of the policy and the law, as the Court reads it to you. Thank you very much.

Instructions to Jury

The Court: Now members of the jury, now that you have heard the arguments of counsel, the time has come to instruct you as to the law governing this case. Although you, as jurors, are the sole judges of the facts, you are duty bound to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law, regardless of any opinion you may have as to what the law ought to be. It would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court. The instructions now being given to you are the law of this case and must govern you in your deliberations.

It is the right and the duty of the jury to determine all questions of fact. You must determine the facts from the evidence. The law of this case, as contained in these instructions, must be applied by you to the facts as you find them from the evidence.

Neither by these instructions nor by any ruling or remarks [79] made by the Court during the course of the trial did or does the Court mean to

give any opinion on questions of fact. These instructions are to be considered by you as one connected series. As I said previously, you must not pick out any one individual instruction and disregard the others, but you must take all the instructions together as the law.

If counsel for any party, in the course of his argument, makes any statement which is not based upon the evidence, you must disregard that statement.

You are instructed that since the policy of insurance involved in this case is a valued policy, there is no burden upon the plaintiff to establish the value of the residence at the time of the fire. It has been stipulated there was the fire which totally destroyed the plaintiff's residence and if you therefore find that the plaintiff is entitled to recover on the policy, you are instructed to award the plaintiff $8000 for the loss of the real property, plus such other sums which you may reasonably compensate the plaintiff for the loss of personal property in the residence, which shall not exceed $2000.

Under our Public Law 102 of the Fourth Guam Legislature, 1958, First Special Session, Section 43356, it states there are two types of policies, open and valued. One is an "* * * open policy which is one wherein the value of the subject matter is not agreed upon but is left to be ascertained in case of loss. An open policy shall not be written on real property for fire insurance or miscellaneous insurance." And "(b)," and what we are interested in in

this case, "A valued policy which is one containing on its face an expressed agreement that the thing insured [80] shall be valued at a specified sum."

Section 43408: "Total loss by fire or miscellaneous insurance: Recovery of full amount. A fire or miscellaneous insurance policy, in case of a total loss of any risk insured under the classes specified in this title as fire or miscellaneous insurance, shall be held and considered to be a liquidated demand against the insured taking such risk for the full amount stated in such policy, or the full amount upon which the insurer charges, collects or receives a premium; provided the provisions of this article shall not apply to personal property."

Now in this case a policy of insurance was issued by the defendant on the 8th day of March—Rather, strike that. Was issued to the defendant on the 8th day of October, 1959, and under endorsement number one it states, in part, that $8000 of this amount of $10,000 shall be on the real property and $2000 on the contents. So you understand it, this policy contains an endorsement which covers both the real property and the personal property and, as I said, $8000 on the real property and $2000 on the personal property.

There has been testimony, and it has been so stipulated by counsel, that there is a total loss, and as a total loss, then the amount under the real property clause of endorsement one will be a liquidated demand from the insurance company for that amount.

The testimony of one witness worthy of belief is

sufficient to the proof of any fact and would justify a finding in accordance with such testimony, even if a number of witnesses testified to the contrary, if, from the whole case, considering the credibility of the witnesses, and after weighing the various factors of [81] evidence, you should believe that a balance of probability exists pointing to the accuracy and the honesty of one witness.

Now the question for you to decide in this case is the value of the personal property at the time of the fire. Mrs. Santos testified that she had in her home a number of household items, which she testified as to the time approximately when she bought them and what she paid for them and her opinion as to what the value of these items were at the time of the fire. You must remember that the value of the items at the time of the fire, or which you, as jurors, consider from the testimony to be the value, that is the amount that Mrs. Santos is claiming and you should return a verdict for that amount, if you believe from the testimony that the personal property had been totally destroyed. So it is the value of the personal property at the time of the fire, that amount you will determine.

Now, ladies and gentlemen of the jury, if you can conscientiously do so, you are expected to agree upon a verdict in this case. The matter that has been considered—presented to you for your consideration is a serious one, as are all cases that are submitted to juries. You should bring to your consideration of this case your earnest and honest en-

deavor to solve it justly and propertly, with due regard to the plaintiff and the defense.

Let me say to you you should freely consult with one another in the jury room. If any one of you should be convinced your view of the case is erroneous, do not be stubborn and do not hesitate to abandon your own view under the circumstances. On the other hand, if, after a full exchange of ideas, you still believe you are right, do not surrender your honest conviction as to the weight [82] or effect of the evidence solely because of the opinion of your fellow jurors or for the purpose of returning a verdict.

The Court finally cautions you that if it becomes necessary for the jury to communicate with the Court respecting any matters connected with the trial of the case, you should not indicate to the court in any manner how the jury stands numerically or otherwise on the issues submitted. This caution the jury should observe at all times after the case is submitted to it and until the jury has reached a verdict.

When all of you agree to a verdict, it is the verdict of the jury. In other words, your verdict must be unanimous. When you retire to the jury room to deliberate, you will select one of your number as foreman or forelady and he or she will sign your verdict for you when it has been agreed upon and he or she will represent you as your spokesman in the further conduct of this case in the court.

It is proper to add the caution that nothing said in these instructions, nothing in any form of verdict

prepared for your convenience, is to suggest or to convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is the sole and exclusive duty and responsibility of the jurors.

Will counsel approach the bench, please.

(Counsel and Reporter approached the bench, where the following transpired out of hearing of the jury:)

The Court: Either counsel wish to note any exception to the charge of instructions given by the Court?

Mr. Crain: No, your Honor. [83]

Mr. Barrett: No, I have no exceptions.

The Court: Let the record show that both counsel have no objections and agree to the instructions as the Court has given.

(Back in open court.)

The Court: Now ladies and gentlemen of the jury, the Clerk has prepared a form of verdict which is for your convenience in figuring out, so you won't have to prepare one for yourself. The form of verdict does not indicate to you how you should decide the case. It is merely made out, or, rather, strike that. It is made out as follows: "We, the jury, find in favor of the plaintiff, Luisa B. Santos, and against the defendant, National Union Fire Insurance Company, a corporation, in the sum of 'blank' dollars for real property, and 'blank'

dollars for personal property," then the total amount. As I previously instructed you, you will return the verdict for the real property for $8000 and then you will determine, in addition to that, what amount the plaintiff should recover, if anything, for the amount of the personal property which she lost as a result of this fire.

The instructions of the Court are now completed and will the Clerk swear in the Bailiff and the Policewoman.

(So done. Jury escorted from the courtroom.)

The Court: I will ask counsel to remain here in the building within reasonable distance and if you wish to leave the building, make known where you will be so that the Clerk will be able to reach you when, so you can return back to the courtroom within five minutes.

(Jury returned to the courtroom.)

The Court: Let the record show that all members of the jury [84] are present in the jury box.

Mr. Foreman, have you reached a verdict?

The Foreman: We have, your Honor.

The Court: Will you hand it to the Bailiff, please.

(Delivered to the Court by the Bailiff.)

The Court: The Clerk will read the verdict.

The Clerk: "We, the jury, find in favor of the plaintiff, Luisa B. Santos, and against the defendant. National Union Fire Insurance Company, a

corporation, in the sum of $8000 for real property and $2000 for personal property, a total of $10,000." Dated, October 11, 1960. Signed, "John L. Gilmore," Foreman.

Ladies and gentlemen of the jury, is this your verdict, each of you?

The Jury: It is.

The Foreman: It is, your Honor.

The Court: Members of the jury, the Court wishes to thank you for the attention and diligent consideration you have given this case. You will now be excused and report back to this courtroom on Thursday morning of this week. That will be October 13, at 9:30 a.m. I know it has been rather difficult as you have experienced here, sitting on the jury, the number of interruptions we have, these beautiful chimes and aircraft and other things flying overhead, and I hope that probably some day we will have a courtroom of our own so we can conduct trials without these many interruptions. However, the jury has indicated, during the trial, their attentiveness, as the Court already mentioned, and again I want to thank you. You are now excused. [85]

Certification

District Court of Guam,
Territory of Guam—ss.

I, John E. Barnes, Official Court Reporter for the District Court of Guam, hereby certify the foregoing 85 pages to be a true and complete transcript

of the Stenographic shorthand notes taken by me in said case at the time and place as set forth therein.

/s/ JOHN E. BARNES,
Official Court Reporter.

[Endorsed]: Filed May 11, 1961. [86]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS RELIED UPON

National Union Fire Insurance Company, defendant-appellant in the above-entitled action, pursuant to Rule 75(d), Federal Rules of Civil Procedure, hereby states that it intends to rely upon the following points on appeal:

1. The Court erred in refusing to declare a mistrial after the opening statement of counsel for plaintiff as demanded by defendant.

2. The Court erred in refusing to dismiss this cause at the close of plaintiff's case, having before it the policy contract and the alleged sworn proof of loss, it being evident on the face of the proof of loss that it was insufficient under the policy contract to sustain the complaint.

3. The Court erred in not directing a verdict for defendant at the close of plaintiff's case.

4. The Court erred in not directing a verdict for defendant at the close of defendant's case.

5. The Court erred in giving judgment to plaintiff.

Dated this 5th day of June, 1961.

/s/ E. R. CRAIN,
Attorney for Defendant-Appellant.

[Endorsed]: Filed June 5, 1961.

[Title of District Court and Cause.]

MINUTES OF THE COURT

1960

6-23—Notice of Motion to set cause for Pretrial Conference having been filed this day, Ordered cause placed on the Calendar for hearing on Friday, July 1, 1960, at 9:00 a.m.

7-1—Hearing (Furber):

Plaintiff appears by W. S. Barrett, Esq., her attorney.

Defendant appears by E. R. Crain, Esq., its attorney.

By agreement between counsel cause placed on the Calendar for Pretrial Conference on Tuesday, July 19, 1960, at 2:00 p.m.

7-19—Pretrial Conference (Furber):

Attorneys of record appear. Conference had. Ordered cause continued on the Calendar for

further Pretrial Conference on Thursday, July 28, 1960, at 3:00 p.m.

7-28—By agreement between counsel of record, Ordered further Pretrial Conference set ahead to Friday, July 29, 1960, at 3:00 p.m.

7-29—By agreement between counsel of record, Ordered further Pretrial Conference set ahead on Tuesday, August 2, 1960, at 10:00 a.m.

8-2—Further Pretrial Conference:

Attorneys of recond appear. Conference held. Pretrial Order to be filed setting cause for Trial to Jury on Tuesday, August 30, 1960, at 9:30 a.m.

8-30—By agreement between the attorneys of record, Ordered case set ahead on the Calendar for Trial to Jury on Tuesday, October 11, 1960, at 9:30 a.m.

10-11—Trial to Jury:

Plaintiff appears in person and with W. Scott Barrett, Esquire, her attorney.

Defendant appears in person and with E. R. Crain, Esquire, his attorney.

A Jury of 12 persons is duly impaneled and sworn.

Evidence taken and Plaintiff's Exhibits Nos. 1 & 2 and Defendant's Exhibit "A" introduced in evidence without objection. Case is rested and the jury is charged and deliberates returning with a verdict in favor of the plaintiff in the sum of $10,000.00.

11-2—Notice of Hearing on Allowance of Statutory Attorneys' Fees and Penalties, having been filed this day, Ordered cause placed on the Calendar for

hearing on Wednesday, November 9, 1960, at 9:30 a.m.

11-9—Ordered hearing on motion continued on the Calendar to Friday, November 18, 1960, at 9:00 a.m.

11-18—Ordered hearing on motion continued on the Calendar to Friday, November 25, 1960, at 9:00 a.m.

11-25—Hearing:

Attorneys of record appear. Arguments of counsel had and the motion on attorneys' fees and statutory penalties is taken under advisement.

11-15—Filed Opinion.

Attest: A true copy.

[Seal] /s/ ROLAND A. GILLETTE,
Clerk, District Court of
Guam, Territory of Guam.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE
OF TRANSMITTAL

I, Roland A. Gillette, Clerk of the District Court of Guam for the Territory of Guam, M. I., do hereby certify that the following documents, to wit:

1. Complaint, filed April 22, 1960.
2. Stipulation to extend time to answer or otherwise plead, filed May 2, 1960.
3. Answer, filed June 15, 1960.

4. Plaintiff's Request for Jury Trial, filed June 23, 1960.

5. Notice of Motion to set for Pretrial Conference, filed June 23, 1960.

6. Notice of Filing of list, etc., filed August 2, 1960.

7. Pretrial Order, filed August 11, 1960.

8. Verdict, filed October 11, 1960.

9. Notice of Hearing on Allowance of Statutory Attorneys' Fees and Penalties, filed November 2, 1960.

10. Opinion, filed December 15, 1960.

11. Judgment upon Verdict, entered and filed January 13, 1961.

12. Notice of Appeal, filed February 9, 1961.

13. Notice of Cross-Appeal, filed February 14, 1961.

14. Affidavit of Official Court Reporter, filed March 20, 1961.

15. Application to Extend Time for Filing Record and Docketing Appeal, filed March 20, 1961.

16. Order extending time, etc., filed March 20, 1961.

17. Affidavit of Official Court Reporter, filed May 2, 1961.

18. Application to Extend Time for Filing Record and Docketing Appeal, filed May 2, 1961.

19. Order extending time, etc., filed May 2, 1961.

20. Court Reporter's Transcript of Proceedings, filed May 11, 1961.

21. Designation of Contents of Record on Appeal, filed June 5, 1961.

22. Appellant's Statement of Points Relied Upon, filed June 5, 1961.

23. Minute entries of clerk.

are the original or certified copies of the original documents filed in the Office of the Clerk in the above-captioned case.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of the aforesaid court at Agana, Guam, M. I., this 10th day of June, 1961.

[Seal] /s/ ROLAND A. GILLETTE,
Clerk.

[Endorsed]: No. 17446. United States Court of Appeals for the Ninth Circuit. National Union Fire Insurance Co., Appellant, vs. Luisa Santos, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Guam.

Filed June 24, 1961.

Docketed July 12, 1961.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 17458

United States
Court of Appeals
for the Ninth Circuit.

MARY M. BEHRENS,

Appellant,

v

UNITED STATES OF AMERICA, WILDA L. DINNELL,

Appellees.

APPELLANTS' OPENING BRIEF

LERRIGO, THUESEN & THOMPSON
BY: MAURICE E. SMITH
804 Security Bank Bldg.
Fresno, California
Attorneys for Appellant

Harrison-Hartford CO., Beverly Hills, California · BRadshaw 2-7888

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[STATUTES CITED]

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No. 17458

United States
Court of Appeals
for the Ninth Circuit.

MARY M. BEHRENS,

Appellant,

v

UNITED STATES OF AMERICA, WILDA L. DINNELL,

Appellees.

APPELLANTS' OPENING BRIEF

I

STATEMENT OF PLEADINGS AND FACTS, SHOWING COURT'S JURISDICTION.

This cause arises to jurisdiction of the District Court under § 19 of the World War Veterans' Act of 1924, as Amended, [45 Statutes 964; 38 U.S.C.A. 445], which is

incorporated by reference in § 617 of the National Service Life Insurance Act of 1940, as Amended [54 Statutes 1014; 38 U.S.C.A. 817; also 38 U.S.C. 784].

The jurisdiction of the United States Court of Appeals, Ninth District, comes upon the review of the judgment of the District Court, Southern District of California, Northern Division, entered May 15, 1961, upon the Order for Judgment executed by the Court March 9, 1961, and upon Findings of Fact and Conclusions of Law executed by the Court May 15, 1961.

II

STATEMENT OF THE CASE

This is an action involving the disposition of proceeds of a deceased serviceman's policy of National Service Life Insurance. The plaintiff herein is the beneficiary under Policy No. V1426-22-92, National Service Life Insurance, and the holder of said policy. Co-defendant Wilda Dinnell claims as beneficiary thereunder on grounds of intent of serviceman that she become the beneficary.

The sole question involved is whether there was accomplished a change of beneficiary of said policy of National Service Life Insurance.

The question is raised in that the entire record of

the serviceman in the hands of the Veterans Administration was presented by stipulation to the Court, and no other factual or evidentiary evidence was taken. The trial Court concluded from the record (the entirety thereof being raised and presented to the Appellate Court), that plaintiff is the named beneficiary, but that the serviceman intended to change the beneficiary thereunder, and that such intention alone is sufficient under the law to accomplish a change of beneficiary.

III

ERRORS URGED

1. That the United States District Court, Southern District of California, Northern Division, erred in the Finding of Fact No. III, and that said Finding should have read:

> "That the said Henry Dinnell in April, 1952, obtained a decree of divorce from the said Mary M. Dinnell; that on December 31, 1952, the said Henry Dinnell entered into a marriage with the defendant, Wilda L. Dinnell, at Rantoul, County of Champaign, State of Illinois; that said Henry Dinnell thereafter did not change the beneficiary on said policy of insurance and the named beneficiary thereunder at all times remained Mary M. Dinnell; that on October 25, 1954, the said Henry Dinnell did

executed United States Air Force Form DD 93, Record of Emergency Data, designating the said Wilda L. Dinnell 'receive each month 100% of my pay' and the said Wilda L. Dinnell be designated to receive 100% of serviceman's indemnity under Public Law 23 of the 82nd Congress (gratuity pay and benefits); that said DD Form 93 specifically states: 'Does not operate as a designation or a change of beneficiary of any insurance contracts issued by the United States Government;' that on April 10, 1956, said Henry Dinnell did execute another U.S.A.F. DD 93 Data Form wherein and whereby the said Henry Dinnell did designate said Wilda Lee Dinnell as beneficiary 'for the unpaid pay and allowance (Public Law 147, 84th Congress)' as person to be notified in case of emergency, as beneficiary for gratuity pay, and as person to receive personal effects for safekeeping; that said U.S.A.F. Form DD 93 (Record of Emergency Data) specifically states therein by specific insertion typewritten, 'not applicable to National Service Life Insurance'; that at the date of the death of the said Henry Dinnell on March 23, 1957, the sole beneficiary under the said policy of insurance was and is the named beneficiary, Mary M. Dinnell; that the said Henry Dinnell specifically intended to leave the said named beneficiary, Mary

> M. Dinnell, on said policy of insurance; that the said Henry Dinnell specifically made each DD Form 93 not applicable to National Service Life Insurance beneficiary."

That specifically, the error of the said Finding is that the said dependency form (DD Form 93) specifically applies only to the designation of benefits of survivors and dependants, and specifically states thereon that it is not applicable to change of beneficiaries of National Service Life Insurance, and that the said deceased serviceman, being an Army company clerk, and First Sergeant for more than 15 years, specifically wrote upon said dependency form (Form DD 93): "Not applicable to National Service Life Insurance".

2. That the United States District Court, Southern District of California, Northern Division, erred in Conclusion of Law No. I, and that said Conclusion should have read:

> "That plaintiff Mary M. Behrens is the named beneficiary under said policy of insurance and is entitled to the proceeds thereof.",

for the same reasons, as assigned immediately above.

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IV
ARGUMENT

FACTS: This case was submitted to the trial Court upon the voluminous records of the Veterans Administration, which also includes the service record of the deceased serviceman, Henry L. Dinnell, all of which has been referred up to the Appellate Court, and reveal the following pertinent information:

Henry Dinnell, the deceased serviceman, had almost continuous active military service from 1940 until the date of his death on the 23rd of March, 1957. He first married Lillian Dinnell, in 1928, and had by her two children, Billy Jo and Patsy Ruth. He divorced Lillian March 23, 1944, and married the plaintiff, Mary Dinnell, October 28, 1944; that he divorced the plaintiff April 23, 1952, and married the defendant Wilda Dinnell December 30, 1952; that during the course of the marriage of the plaintiff to the serviceman, and continuing thereafter, the plaintiff and the serviceman and his children and family and mother were very close; that plaintiff took care of his mother, and still continues intimate relations with her, through visits and correspondence. The serviceman remained close to plaintiff's family after the divorce, and made visits to near the time of his death (October 1956); that from time to time the serviceman executed properly change of beneficiaries, both

primary and secondary; that he was completely familiar with the necessity and the forms therefor; the record reveals these changes were made upon Veterans' Administration forms, not DD forms. [VA Form 9-336]. The record reveals that each time the change of the contingent beneficiary and the primary beneficiary was made, the serviceman executed these forms. That almost five years passed from the time of the divorce of the plaintiff to the death of the serviceman, with no effort on his part to change either the primary or contingent beneficiaries as he had in the past. Records reveal statements of the serviceman that he would never change the beneficiaries therefrom from his children and the woman that raised them. That on April 1, 1955, some three years after the divorce from plaintiff, the serviceman applied for and secured a renewal of said policy for another five-year term, and the same remained in full force and effect until the serviceman's death, and that the said renewal left plaintiff as beneficiary thereunder. That co-defendant Wilda Dinnell's sole claim of change of beneficiary arises out of the execution of a dependency designation form [DD Form 93] admittedly not executed until October 25, 1954, some two years after the deceased serviceman's marriage to her, coupled with letters discussing insurance, which plaintiff alleges to refer to

civil policies of insurance obtained by the serviceman and received by the co-defendant Wilda Dinnell. That in a letter dated December 13, 1956, to co-defendant Wilda Dinnell the serviceman stated: ".....I am sending you a copy of the new survivor's benefits and this new deal is better than insurance.....", and on December 28, 1956, his letter states: "I haven't heard from my insurance yet, so I don't know how much it will be." The record further reveals that in October, 1956, some two months prior to said letter, the serviceman indicated he would never change his insurance from the named beneficiaries.

Argument:

The mere execution of a dependency designation form [DD Form 93], noting the present wife as gratuity beneficiary, is unsufficient to change the beneficiary of National Service Life Insurance [Coleman v United States, 176 Fed. (2d) 469].

Testimony that a deceased veteran had signed an application for change of beneficiary from sister to wife does not establish a change of beneficiary thereunder, where the records of the Veterans Administration showed no such change [Walson v United States, 185 Fed. (2d) 292; Kluge v United States, 206 Fed. (2d) 344].

Serviceman's divorce from a wife named as beneficiary

in National Service Life Insurance policy would not, standing alone, work a change of beneficiary thereunder [Hawkins v Hawkins, 271 Fed. (2d) 870].

The case of Hawkins v Hawkins, supra, may prove valuable to the Court in the instant case, in that it contains a very similar factual situation. The case arose in the Fifth Circuit, upon an action brought by a deceased serviceman's then present wife against a former wife, who was the named beneficiary under a policy of National Service Life Insurance obtained August 1, 1950. In 1951, the serviceman divorced his then wife upon the grounds of adultery, and in 1954 married the plaintiff, and died in 1955. Subsequent to his marriage in 1954, the serviceman executed an Army AGO Form 41, (similar to Air Force Form DD 93), designating his then present wife (the plaintiff) the recipient of his gratuity pay, dependency benefits, etc. The Fifth Circuit Court reviewed an extensive history of cases containing similar factual situations, and concluded:

> "We think it is plain that a careful reading of the cases from this circuit, as well as from the others, makes it clear that the sufficiency of the overt acts required is partially judged by the clarity and positiveness of the proof of intent. As was said by us in the first case cited, Mitchell v United States, supra, 165 F. 2d at page 761:

> '.....It is said that a combination of intent and act is required, but to say in these insurance cases that though intention to change the beneficiary is proved to the hilt, no effective formal act having been done no change can be held to have been made, is not to brush technicalities very far aside.....'
>
> "It is obvious that either clear and convincing proof of continuing intent or a clearly defined and unequivocal act seeking to make the change is necessary to prevent the frauds 'obviously latent in the situation if basic minima of proof be disregarded.' Cohn v Cohn, 84 U.S. App. D.C. 218; 171 F. 2d 828, 829."

In the case before this Honorable Court, plaintiff herein respectfully submits that a careful reading of the record indicates no overt act upon the serviceman's part. The serviceman here spent fifteen years in the orderly room, was fully cognizant of the method and act of change of beneficiaries of National Service Life Insurance, had made several changes, and in fact, the change of beneficiaries was part of his duties as a First Sergeant.

Careful consideration should be given by the Court in reversing the named beneficiaries either under a policy of insurance or a will. Many oral statements are made for their effect upon the listener, and are not carried out,

when the solemnification of written execution carries with it the careful thought required to remove as beneficiaries either from insurance or will one's own children and the woman that raised them. As was stated by the Court in Butler v Butler, 177 Fed. (2d) 471, at 472, in holding that the deceased veteran had not effectively changed the beneficiary:

> "It is evident that the insured knew who was named as beneficiary in his policies, and failed to make any changes therein."

A scholarly review of a multitude of cases involving change of beneficiary under National Service Life Insurance is made in 2 A.L.R. (2d) 484, and a summary of those cases convinces the appellant herein that in order to execute a change of beneficiary under National Service Life Insurance "by intent", there must be "strong, almost incontrovertible, evidence, of an intention to change, coupled with an overt act directed toward the accomplishment of that intent, and a continuance of that intent to the time of death".

Appellant feels that the position of the Court is well-taken in preserving the sanctity of the execution of beneficiaries during well-considered period from change caused by hasty and oral promises, and the frailty of the G.I. in human emotions, making spontaneous promises and

declarations which would not be carried through or accomplished under the solemnity of the considered execution of written instruments.

Appellant therefore respectfully submits that a review of the facts and evidence in this case (the entirety thereof being raised on appeal), fails in legal sufficiency to support a holding overruling the solemnity of the naming of a beneficiary, and that the case should be reversed, with instructions to enter judgment for the plaintiff herein, the named beneficiary of the National Service Life Insurance policy herein set forth.

Respectfully submitted this 29th day of September, 1961.

LERRIGO, THUESEN & THOMPSON

BY: MAURICE E. SMITH

Attorneys for Appellant.

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No. 17458

United States Court of Appeals

for the Ninth Circuit.

MARY M. BEHRENS,

Appellant,

v

UNITED STATES OF AMERICA, WILDA L. DINNELL,

Appellees.

BRIEF OF APPELLEE
WILDA L. DINNELL.

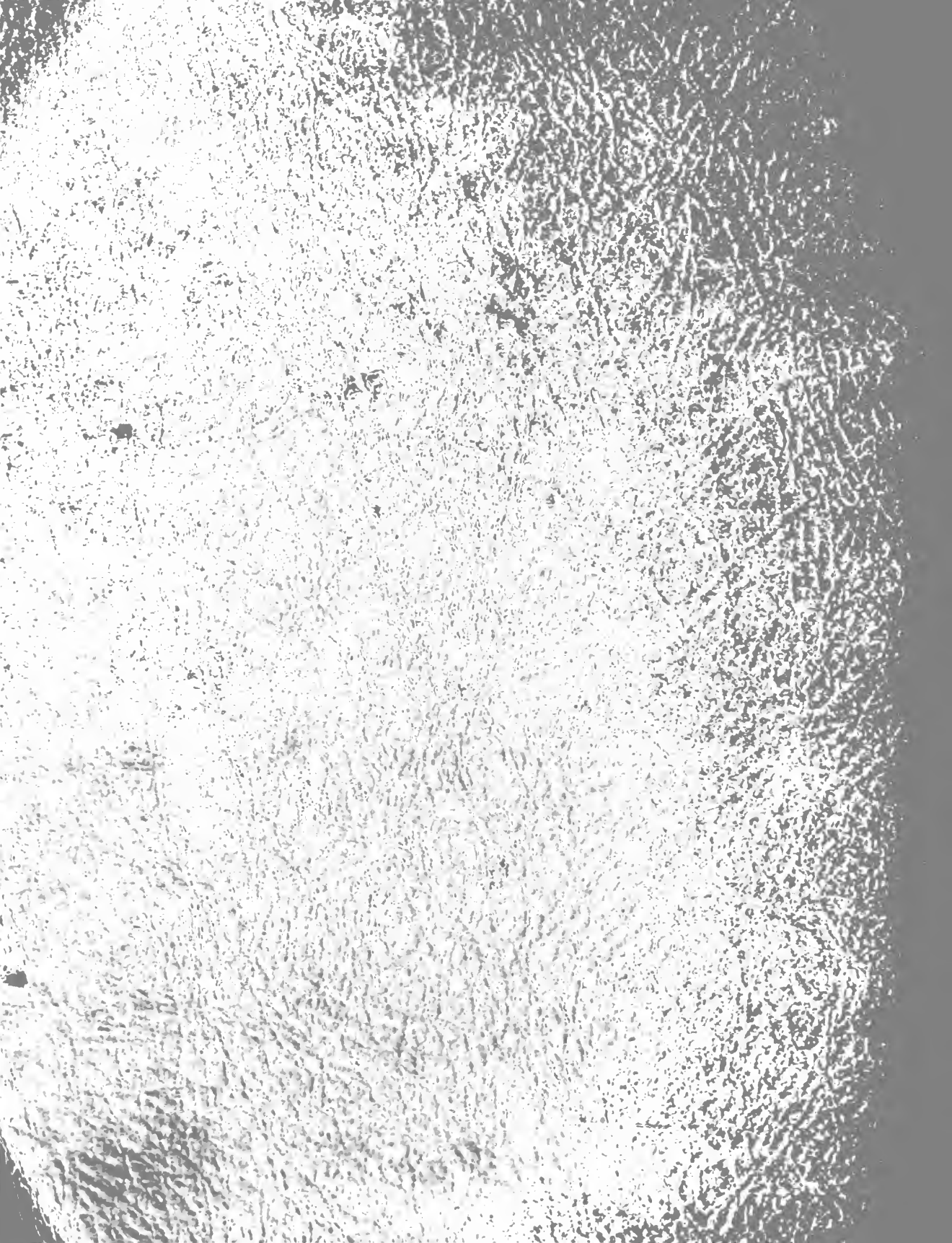
SUMMERS & WATSON, and
JOHN SAID

BY: JOHN SAID

202 Security Bank Bldg.
Fresno, California

Attorneys for Appellee,
Wilda L. Dinnell.

Harrison-Hartford Co. Beverly Hills, California · BRadshaw 2-7888



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MARY M. BEHRENS,

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Appellees.

BRIEF OF APPELLEE
WILDA L. DINNELL.

I

STATEMENT OF PLEADINGS AND FACTS, SHOWING COURT'S JURISDICTION

Counsel for appellee has read the Statement of Pleadings and Facts showing Court's jurisdiction which is found on pages 1 and 2 of Appellant's Opening Brief and

believes that it fairly covers the situation. Hence, nothing will be added to same.

II

STATEMENT OF THE CASE

A. Reason for Appellee Presenting own Statement of Case.

Counsel for appellee may present his or her own statement of the case under Rule 18.3 of United States Court of Appeals which provides that appellee may present his or her own statement of the case where the appellant's statement of the case is controverted. Counsel for appellant states on page 2 of the Brief that Appellee Dinnell claims to be the beneficiary on the grounds of the intent of the serviceman. Likewise, on page 3 of Appellant's Brief, it is stated that the trial court concluded that the serviceman intended to change the beneficiary and that such intention alone is sufficient under the law to accomplish a change of beneficiary.

It is respectfully submitted that the record in this case indicates clearly that the trial court based its decision not only on intent alone, but also on the fact that the serviceman made an overt act. In its order for judgment, the trial court pointed out that the serviceman

intended that appellee receive the entire proceeds and that he "manifested this intention by executing DD Form 93 on October 25, 1954, wherein he listed her as beneficiary for 100% of his insurance". [Lines 29 to 31 on page 1]. This clearly was an overt act. Likewise, the trial court found in paragraph 3 of its Findings [commencing on line 30 of page 2, and continuing to line 4 on page 3]:

> "that said Henry Dinnell thereafter changed the beneficiary on said policy from said Mary M. Dinnell to defendant Wilda L. Dinnell; that particularly on October 25, 1954, the said Henry Dinnell did sign a DD Form 93, Record of Emergency Data, provided by Public Law 23, 82nd Congress, designating said defendant Wilda L. Dinnell as beneficiary for 100% of the proceeds under said policy;".

Clearly, this was an overt act.

B. Appellee's Statement of the Case.

This is an action involving the disposition of proceeds of a deceased serviceman's policy of National Service Life Insurance. The appellant herein was the original beneficiary under Policy No. V1426-22-92, National Service Life Insurance, and the holder of said

policy. Appellee, Wilda Dinnell, claims as beneficiary thereunder on grounds of not only the intent, but also the overt act of the deceased serviceman.

The sole question involved is whether there was accomplished a change of beneficiary of said policy of National Service Life Insurance.

The entire record of the serviceman in the hands of the Veterans Adminstration was presented, by stipulation, to the Court, and no other factual or evidentiary evidence was taken. The trial court concluded from the record (the entirety thereof being raised and presented to the Appellate Court) that Appellee is the beneficiary both by his express intent and by his express overt act.

III

ARGUMENT

A.

FACTS

The serviceman in this case was married three times. He was issued a $10,000.00 National Service Life Insurance policy effective April 1, 1942, naming his first wife, Lillian Thelma Dinnell, as principal beneficiary. On November 17, 1943, he changed the beneficiary, naming his son and daughter as co-beneficiaries for $5,000.00 each. On October 29, 1945, the serviceman changed the beneficiaries

naming the appellant, his then wife, as principal beneficiary. Intermediate changes of beneficiaries, not important here, were made, but on January 9, 1951, the serviceman named the appellant as principal beneficiary. His insurance was renewed effective April 1, 1955, for another five-year period, and remained in full force and effect until the serviceman's death.

The record shows that on October 25, 1954, the serviceman signed a DD Form 93 which was witnessed by Staff Sergeant Charles J. Thomas, Jr. The serviceman indicated thereon that appellee was his wife and he named her as beneficiary for benefits administered by the Service Department. Item 21 of this form is entitled "Designation or Change of Beneficiary - Serviceman's Indemnity (Pl. 23, 82d Cong.)" and contains a notation "(Does not operate as a designation or change of beneficiary of any insurance contracts issued by United States Government)". In the space provided therein for the naming of the beneficiary, the serviceman named the appellee, Wilda L. Dinnell, as beneficiary for 100% and his mother, Louise Dinnell, as beneficiary for 100%. Subsequently, the Veterams Administration received the following statement (a part of the record on appeal) dated May 21, 1958, from said Staff Sergeant Charles J. Thomas, Jr.:

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> "To the best of my knowledge, belief and memory, on 25 October, 1954, when I witnessed the DD Form 93 executed by M/Sgt. Dinnell, he was fully aware that he had $10,000. insurance and that he knew that he was designating his wife, Wilda L. Dinnell, as his primary beneficiary and his mother, Louise Dinnell as contingent beneficiary".

The record further shows that appellee submitted photocopies of the Department of Defense Bulletin and a DD Form 93 signed by the serviceman on January 5, 1953, and letters which appellee stated were written to her by the serviceman on November 1, December 8, December 13 and December 28, 1956, reflecting his love and affection for her. In the serviceman's letter of November 1, he stated that he would have to start paying for his insurance and that there was to be "no more free insurance". In his letter of December 8, the serviceman advised appellee: "I applied for my new insurance today". In his letter of December 13, the serviceman wrote: "I guess I told you before but I sent my insurance in Saturday, so I am sending you a copy of the new Survivors Benefits and this new deal is better than insurance, but I'll have <u>both</u> so baby if something does happen to me you will be sitting on easy St. You will be getting money from 4 sources . . . and that should take care of my baby." (Emphasis added).

In his letter of December 28, the serviceman stated: "I haven't heard from my insurance yet so I don't know how much it will be."

The Service Department "Special Bulletin" lists the four benefits granted under the "Servicemen's and Veterans Survivor Benefits Act" which was effective January 1, 1957, as (1) death gratuity, (2) social security, (3) compensation and indemnity, (4) insurance, and gives a brief description of these benefits. Under the heading "New Information" relating to insurance on the reverse side of the form printed material therein reads:

> "By resuming full payment of premiums which have been under waiver a serviceman's survivors will not only be eligible for the more liberal benefits under the new law, but will also be entitled to the full proceeds of his insurance policy."

After this sentence the handprinted notation apparently made by insured reads: "me or you". Printed material on the form referring to servicemen who never had service life insurance or who allowed insurance to expire is obliterated and the handprinted notation appears: "not me". In another paragraph the bulletin reads:

> "In view of the loss in survivors benefits which may result in an individual's failure to cancel the waiver of premium prior to May 1, 1957, it is important that each member give

> serious thought to the cancellation of such waiver, and, also, the continuation of his service life insurance."

Immediately after this sentence, the handprinted notation appears: "I did, the only thing on $10,000 will cost me about $21.00 per month starting Jan. 57." Another paragraph in the Bulletin, referring to servicemen who allowed Government insurance to expire, reads:

> "If you are one of these, remember that the $10,000 indemnity or 'free insurance' is cancelled after December 31, 1956. It may be wise for you to take out a new service policy to take its place."

And, the handprinted words by the insured reads: "I did."

The record shows that in a letter from the appellee dated August 21, 1957, directed to the Veterans Administration, she stated that in the period during which the above letters were written to her from the serviceman, "he believed his insurance was made in my favor and I also believed that the DD Form 93 he signed in January 1953 was accomplishing this purpose"; that at the time the DD Form 93 was signed, she and her husband discussed the mode of settlement and they agreed she was to receive $100.00 per month from the insurance. Appellee also alleged that the notations made by her husband on the Service Department Bulletin indicated that she was to be the beneficiary

doubt as to his desire or his intent for me to have the insurance."

The record also shows that the serviceman on April 10, 1956, signed a DD Form 93. Item 10 of the latter form provides a space for the naming of beneficiaries for Serviceman's Indemnity purposes and contains substantially similar printed instructions as to its nonapplicability to Government life insurance as to the DD Form 93 of October 25, 1954. In the space provided for the naming of beneficiaries, the typed notation appears: "N/A NSLI".

On page 5 of Appellant's Brief, counsel for appellant states that the serviceman specifically wrote the foregoing notation on the form. It is respectfully submitted that there is nothing in the record whatsoever that the serviceman did this. In all fairness, all that can be said is that it may have been typed in by either the serviceman or the officer who witnessed the execution of the document, one Gilbert E. Haynes. But, as the Government indicated on page 8 of its Memorandum, the notation "N/A-NSLI" apparently intended to show that Servicemen's Indemnity was not applicable since the serviceman had National Service Life Insurance in force.

B.

POINTS AND AUTHORITIES

The law seems to be well-settled to the effect that in order to effectuate a change of beneficiary, there must be both (1) intent and (2) an overt act. The Court of Appeals for the Ninth Circuit stated in Kendig v Kendig, 170 Fed. 2d 750:

> "In cases involving a change of beneficiary under War Risk insurance policies, the courts have striven to effectuate the manifest intention of the insured, provided always he has taken some affirmative action evidencing an exercise of the right to change. There have been differences of opinion only as to the degree or nature of the action necessary to effect the substitution. Strict compliance with the administrative regulations are not exacted." (Emphasis added).

The law is well settled that a written instrument used to effectuate a charge of beneficiary need not be in any particular form. [Moths v United States, 179 Fed. 2d 824 (7th Cir.); Cohn v Cohn, 171 Fed. 2d 828 (D.C. Cir.); and Bratcher v United States, 205 Fed. 2d, 953 (8th Cir.)]

In the case of United States v Smith, 159 F. Supp. 741 (S.D. N.Y.), the court had before it the effect of a DD Form 93. On this form the insured had named the beneficiary for Servicemen's Indemnity, although he had

no such coverage. The court found that the insured had effectuated a change of beneficiary for his insurance. To the same effect [also see Pierce v United States, (M.D. ALA), Civil No. 432-E.]

A similar situation was presented in the case of Staubach v V.A. (E.D. KY.). In the Staubach case, the insured used a DD Form 93-1. He named a beneficiary for Servicemen's Indemnity, although he had no such coverage. The court held that the insured had effectuated a change of beneficiary for his insurance.

We have no quarrel with that portion of the decision in Hawkins v Hawkins, 271 Fed. 2d 870, which counsel quoted from and set forth on pages 9 and 10 of Appellant's Brief. However, we should like to point out that a careful reading of the Hawkins case indicates that when the intent and act are present, the fact that the prescribed form is not used is immaterial.

We would direct this Honorable Court's attention to two cases referred to in the Hawkins case. The first one is found on page 873, et. seq., wherein it is referred to in the following manner:

> "In the next case, decided the same month, McKewen v McKewen, 5 Cir., 165 F. 2d, 761, 765, this Court placed its decision affirming a judgment finding a change from a mother to a later acquired wife on the basis

that the three official Army documents in which the officer stated that his wife was named as the beneficiary actually constituted the requisite notice to the Veterans Administrations, although none of them was in form a request to change the beneficiary. The Court quoted from and approved the holding in the Mitchell case but also said:

> 'The intention, desire, and purpose of the soldier should, if it can reasonably be done, be given effect by the Court, and substance rather than form should be the basis of the decision where, as here, the soldier's intention to name his wife as beneficiary is evidenced by official documents executed by the soldier and delivered to the insurer. His wishes should not be thwarted by the fact that proof of the use of the prescribed forms for accomplishing his intent was not available. White v United States, 270 U.S. 175, 46 S. Ct. 274, 70 L. Ed. 530, Cf. Claffy v Forbes, D.C. 280 F. 233; Roberts v United States, 4 Cir., 157 F. 2d 906.'" (Emphasis added).

The second case is found on Page 874 of the Hawkins decision which counsel for the appellant cited is referred to in the following words:

> "This case was almost immediately followed by the case of Gann v Meek, 5 Cir., 165 F. 2d 857,

> in which the Court, one judge dissenting, affirmed the judgment of the trial court which found that a change in beneficiary had been accomplished. This finding was based on a letter of the deceased to his brother in which the serviceman said: "I did change my insurance if anyone gets it Mom will get it all." The only other evidence was testimony from another serviceman who testified that in combat conditions existing at Saipan, where the insured was killed, mails were occasionally lost. The court accepted the letter as evidence of the intent to change and as proof that the necessary steps had been taken, including the written request to the Veterans Administration, although there was no other proof of his having done so." (Emphasis added)

It is to be noted that in the preceding case the Court accepted a letter as evidence of the intent to change. In the instant case, the evidence showed that the serviceman went before an Army sergeant and signed the DD Form 93. In addition to the signature on the form, we have the positive testimony by a disinterested witness to the effect that the serviceman intended to designate Appellee as his primary beneficiary. Certainly, the stature of the foregoing testimony is more formidable than a letter. Moreover, in the instant case, we have letters and bulletins heretofore referred to.

We respectfully submit that the foregoing two cases referred to in the Hawkins decision followed the law that where intent and act are shown, the fact that the proper form has not been used is immaterial.

Applying the foregoing principles to the instant case, we respectfully submit that both intent and act on the part of the serviceman to name appellee as beneficiary were clearly established, although concededly the proper form was not used.

The intent was established by the letters to appellee from the serviceman, which letters included various bulletins, Governmental bulletins, etc. All of these are a part of the record. The overt act was established by the testimony of the disinterested witness, S/Sgt. Charles J. Thomas, Jr.

Appellee therefore respectfully submits that the judgment of the District Court should be affirmed.

Respectfully submitted this 10th day of November, 1961.

SUMMERS & WATSON and JOHN SAID

BY: JOHN SAID

Attorneys for Appellee,
Wilda L. Dinnell

+

No. 17458

United States Court of Appeals for the Ninth Circuit

MARY M. BEHRENS,

Appellant,

vs.

UNITED STATES OF AMERICA, and WILDA L. DINNELL,

Appellee.

Transcript of Record

Appeals from the United States District Court for the Southern District of California, Northern Division

Parker & Son, Inc., Law Printers, Los Angeles. 12-7-61—12-13-61

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court
Southern District of California
Northern Division

No. 2020-ND

MARY M. BEHRENS,

Plaintiff,

vs.

UNITED STATES OF AMERICA, WILDA L. DINNEL, DOE I and DOE II,

Defendants.

COMPLAINT ON POLICY OF INSURANCE

Plaintiff complains against defendants and for cause of action alleges:

I.

That on 1 April, 1950, the defendant United States of America, issued to one Henry Dinnell, a policy of National Service Life Insurance, the same being policy number V 1426-22-92, a copy of which is incorporated herein and made a part hereof, as though fully set forth hereby reference and attached hereto as Exhibit "A".

II.

That on January 9, 1951, the said Henry Dinnell, duly and properly executed a "change or designation of beneficiary of National Service Life Insurance" on Veterans Administration Form 9-336, a copy of which is incorporated herein and set forth by reference hereto, and attached hereto as Exhibit "B".

III.

That said change or designation of beneficiary, as set forth in said Exhibit "B", designates as principal beneficiary of said National Service Life Insurance Policy, one Mary M. Dinnell; but the said principal beneficiary, Mary M. Dinnell, and the plaintiff herein, are one and the same person.

IV.

That said Henry Dinnell died on March 23, 1957.

V.

That on said date said policy of insurance was in full force and effect and the said premiums thereon were fully prepaid.

VI.

That on said date the said Mary M. Dinnell was the named beneficiary of said policy of insurance.

VII.

That thereafter, plaintiff herein demanded payment of the said policy of insurance under the terms and conditions thereof; that the said defendant United States of America has refused and still refuses said payment; that the said United States of America has paid the sum of $10,000.00 under said policy of insurance to the said defendant Wilda L. Dinnell.

VIII.

That within six (6) years last past, to wit, on December 29, 1959, the Veterans Administration, Board of Veterans Appeals, denied plaintiff's claim for said payment under said policy of insurance.

Wherefore, plaintiff prays:

1. Judgment in the sum of $10,000.00;

2. Costs of suit incurred herein; and

3. For such other and further relief as to the Court may seem just and proper.

LERRIGO, THUESEN,
THOMPSON & THOMPSON,

/s/ By MAURICE E. SMITH.

Duly Verified.

[Endorsed]: Filed Feb. 4, 1960.

[Title of District Court and Cause.]

ANSWER AND COUNTERCLAIM FOR INTERPLEADER OF DEFENDANT UNITED STATES OF AMERICA

Defendant, United States of America, for answer to plaintiff's Complaint, admits, denies, and alleges as follows:

I.

Admits each and every allegation contained in Par. I, II, III, IV, V, and VIII, of plaintiff's Complaint.

II.

Denies each and every allegation of Par. VI of plaintiff's Complaint.

III.

Admits that the plaintiff herein demanded payment of the said policy of insurance under the terms and

conditions thereof; that the said defendant United States of America has refused and still refuses said payment as set forth in Par. VII of plaintiff's Complaint, but denies that the said United States of America has paid the sum of $10,000. or any sum under said policy of insurance to the said defendant, Wilda L. Dinnell.

Further Answering Herein, and by Way of Counterclaim for Interpleader, this Defendant Says:

I.

That Henry Lee Ray Dinnell hereinafter referred to as the insured, while a member of the Armed Forces of the United States and effective as of April 1, 1950, was issued by the Veterans Administration a renewal policy of National Service Life Insurance (identified as Policy No. V-1426-22-92) for which he designated the plaintiff, Mary M. (Dinnell) Behrens and his daughter Patsy Ruth, his son Billy Joe, and his stepdaughter Juanita E. Smith, as beneficiaries for $10,000.; that premiums on said policy were paid by the insured to include July 1, 1951, after which said premiums were waived effective July 1, 1951, pursuant to insurance application for a premium waiver under Section 662 of National Service Life Insurance Act of 1940, as amended (38 U.S.C. §823, 1954 Ed.); that the insurance was again renewed effective April 1, 1955, for another five-year term; that the insured died on the 23 of March, 1957, while the said policy of insurance was in full force and effect.

II.

That following the death of the insured, the plaintiff Mary M. (Dinnell) Behrens filed in the Veterans Administration a claim to the proceeds of the said policy, as the designated beneficiary of record; that a claim for the proceeds of the said policy was also filed at the Veterans Administration by the co-defendant herein, Wilda L. Dinnell, who claimed the insurance by virtue of an alleged change in the designation of the beneficiary in her favor; that both claimants were advised by letters dated July 1, 1957, that the plaintiff was the last named beneficiary of record and they were requested to furnish any evidence they might have to show that the insured had subsequently changed the beneficiary for his insurance. Thereafter, upon consideration of the said claims and based upon certain written and oral testimony, as well as based upon the intention evidenced by the notation on D.D. Form 93, signed by the insured on October 25, 1954, the Veterans Administration rendered a decision on September 10, 1958, that the claim of the co-defendant should be allowed and that all other claims should be denied. The claims of the plaintiff, insured's mother and his children, which had previously been filed, were accordingly disallowed on September 15, 1958, and they were advised accordingly. The said holding being affirmed on appeal by decision dated December 29, 1959, in effect stated that the insurance should be paid to the co-defendant, Wilda L. Dinnell; that notice of the denial of plaintiff's claim was forwarded to all parties by letter dated December 29, 1959, the instant action resulting.

III.

This defendant says that it admits liability under the said policy of insurance and is ready and willing to pay the proceeds thereof to the party lawfully entitled thereto, but because of the conflicting claims of the plaintiff and the co-defendant, Wilda L. Dinnell, it cannot safely make payment to either of them without the aid of this Court. In order, therefore, to avoid multiplicity of suits and the possible subjection of this defendant to double liability under the said policy, it is necessary that this Court determine whether the plaintiff, Mary M. Behrens or the said Wilda L. Dinnell, is entitled to receive the death benefits thereof.

For a Separate, Second and Affirmative Defense, Defendant Alleges:

This Court has no jurisdiction in this action to award costs against the United States.

Wherefore, the defendant prays:

I.

That upon a final hearing the Court adjudge whether the plaintiff or the co-defendant, or either of them, is entitled to receive the death benefits of the policy of insurance herein sued upon and direct the payment of the proceeds thereof to the person found by the Court to be entitled thereto;

II.

That the Court discharge this defendant from any and all liability in the premises, except to the person, or persons, who shall be adjudged by the Court to be entitled to receive the said insurance benefits.

III.

For its costs and such further relief as may to the Court seem proper.

LAUGHLIN E. WATERS,
United States Attorney

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief, Civil Division,

/s/ By EARL P. WILLENS,
Assistant U. S. Attorney,
Attorneys for defendant
United States of America.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 27, 1960.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT,
WILDA L. DINNELL

Now comes the defendant, Wilda L. Dinnell, by Robert C. Summers and John Said, her attorneys, and for her Answer to the Complaint of the plaintiff says:

1. The defendant admits that on April 1, 1950, the United States of America issued to Henry Dinnell a policy of National Service Life Insurance, number V 1426-22-92, and that Exhibit "A" attached to the Complaint is a copy of said policy.

2. The Defendant admits that on January 9, 1951, the said Henry Dinnell designated his then-wife Mary

Dinnell (now Mary Behrens) as principal beneficiary for the full amount of his insurance under said policy, and his son, Billy J. Dinnell, as contingent beneficiary; and defendant further answering says that in April, 1952, the said Henry Dinnell obtained a Decree of Divorce from the said Mary Dinnell and on December 31, 1952, the said Henry Dinnell did enter into a marriage with the defendant at Rantoul, County of Champaign, State of Illinois, and thereafter changed the beneficiary on the said policy from the said Mary Dinnell to this defendant, and particularly on October 25, 1954, the said Henry Dinnell did sign a DD form 93, Record of Emergency Data, provided by Public Law 23 82nd Congress, designating this defendant as beneficiary for 100 per cent of the proceeds under the said policy, and designating as his contingent beneficiary, Louise Dinnell; and again on April 10, 1956, the said Henry Dinnell did execute another Data form to the Service Department of the U. S. Air Force wherein and whereby the said Henry Dinnell did designate this defendant as the sole beneficiary of the funds under the said insurance policy and the said Henry Dinnell did by numerous letters and documents during the months of November and December, 1956, designate this defendant as the sole beneficiary under the said policy of insurance and this defendant was at all times thereafter and at the date of the death of the said Henry Dinnell on March 23, 1957, the sole beneficiary under the said policy of insurance, and the said Henry Dinnell intended that this defendant be the sole beneficiary under the said policy.

3. The Defendant admits that the said Mary M. Dinnell, who at one time had been listed as principal beneficiary under said policy of insurance, as it is shown by Exhibit "B", is one and the same person as the plaintiff herein but this defendant adopts and re-alleges the said allegations set forth in paragraph two of this Answer as and for her additional allegations of this paragraph.

4. The defendant admits that the said Henry Dinnell died on March 23, 1957, at Lackland Air Force Base Hospital, San Antonio, Texas.

5. The defendant admits the allegations of paragraph five.

6. The defendant admits that Mary M. Dinnell was at one time named the principal beneficiary of the said policy of insurance, but defendant states affirmatively that at the time of the death of the said Henry Dinnell, and at all times from and after November 25, 1954, this defendant was the sole and exclusive beneficiary under the said policy of insurance.

7. The defendant admits that the said plaintiff has made a claim for payment under the said policy of insurance and said claim was prosecuted through the Board of Veterans Appeals, Veterans Administration, Washington, D.C., which said Board of Veterans Appeals rendered a decision on December 29, 1959, finding and declaring that this defendant was entitled to the proceeds under the said policy of insurance and the said decision of the said Board of Veterans Appeals is attached hereto and marked Exhibit "A" and incorporated herein.

8. The defendant admits the allegations of paragraph eight.

Wherefore, this defendant denies that the plaintiff is entitled to a judgment in the sum of Ten Thousand and 00/000 Dollars ($10,000) and costs of suit or for any relief whatsoever, and this defendant prays that the Complaint of the plaintiff may be dismissed in bar of action at the costs of the plaintiff.

WILDA L. DINNELL,
Defendant
/s/ By ROBERT C. SUMMERS,
Her Attorneys

Exhibit A
Veterans Administration
Board of Veterans Appeals
Dec. 29, 1959

DINNELL, Henry
Claim No.XC-20 255 166
Docket No. 503 442

Mary Behrens
Billy J. Dinnell
Patsy D. Herndon
Title 38, U. S. C.

NSLI—Contract Benef. Desig. Denied

Mary Behrens represented by: Maurice E. Smith, attorney.

Question at Issue:

Disposition of the proceeds of the serviceman's policy of National Service Life Insurance.

Contentions: Mary Behrens, former wife of the serviceman, contends that she was designated principal beneficiary for the serviceman's insurance and that no change in beneficiary by the serviceman was recorded prior to his death. She contends further that a form dated October 25, 1954, should not be accepted as a change of beneficiary.

It has also been contended to the effect that the serviceman's children, Billy J. Dinnell and Patsy D. Herndon, should receive insurance benefits.

Outline of Material Evidence: National Service Life Insurance in the amount of $10,000.00 was in force when the serviceman died on March 23, 1957. The agency of original jurisdiction has determined the insurance proceeds are payable to his widow, Wilda L. Dinnell. Claims by the serviceman's mother, Louise Dinnell; former wife, Mary Behrens; son, Billy J. Dinnell and daughter, Patsy D. Herndon, were denied because they were not the designated beneficiaries.

By form dated January 9, 1951, the serviceman designated his former wife, Mary, as principal beneficiary for the full amount of his insurance and his son as contingent beneficiary. On May 31, 1951, he signed an application for waiver of premiums under the provisions of Public Law 23, 82nd Congress. The waiver was granted and it was by virtue thereof the insurance was in force when the serviceman died.

During April 1952, the serviceman obtained a divorce decree dissolving his marriage with Mary. In December 1952, the serviceman and Wilda were married.

The report of a field examination is of record. Mary and her sister deposed to the effect that the service-

man stated he would never change the beneficiary for the policy and that around September or October 1956 he said he still had the insurance in Mary's name. The statement of the sister which had been submitted before the field examination is included in the evidence now before the Board. Also included therein is a joint statement of James and Lorene Dinnell presented for consideration with the claim of the children.

On October 25, 1954, the serviceman signed a DD Form 93, Record of Emergency Data, upon which he named Wilda for various Service Department purposes. On a portion of the form provided for designation of beneficiary for indemnity provided by Public Law 23, 82nd Congress, the serviceman listed Wilda as beneficiary for "100%" and under her name his mother as beneficiary for "100%". Above these designations is advice that the form did not operate as a designation or change of beneficiary for insurance contracts. The serviceman's signature to this form was witnessed and the witness has furnished a statement in which he sets forth that to the best of his knowledge when he witnessed the form the serviceman was fully aware that he had $10,000.00 insurance and that he knew he was designating his wife, Wilda, as his primary beneficiary and his mother as contingent beneficiary. The copy of the aforesaid form was received from the Service Department. Also received from the Service Department was copy of another data form which was dated April 10, 1956, and by which the serviceman again named Wilda for a number of Service Department purposes.

The serviceman's widow has furnished several letters written to her by the serviceman during November and December 1956. These letters reflect the serviceman's

love and affection for Wilda. The letters include references to his insurance. One letter is under date of December 13, 1956, and in it, after referring to his insurance, he states that if something happened to him she would be sitting on easy street as she would be receiving money from four sources. With this letter he sent Wilda a Service Department publication upon which the four sources to which he referred in his letter are set forth. One of the sources is "Insurance." Essential Elements for Entitlement: Literal compliance with the applicable law and regulations would require a change of beneficiary respecting National Service Life Insurance to be made in writing in proper form and transmitted to this Administration. However, this Administration and Federal Courts hold generally that legal technicalities will be brushed aside to effectuate an intent on the part of the insured to make a change if he took adequate affirmative action to make a change and reasonably believed he had accomplished a change. Receipt of evidence establishing a change of beneficiary designation for National Service Life Insurance after death of the insured does not in and of itself bar recognition of the change.

Discussion and Decision: By form dated January 9, 1951, the serviceman designated Mary as principal beneficiary for his insurance and his son, Billy J. Dinnell, as contingent beneficiary. Later, he applied for and was granted waiver of premiums under Section 622 of the National Service Life Insurance Act of 1940, as amended, which was provided by Public Law 23, 82nd Congress. In April 1952 he obtained a divorce dissolving his marriage with Mary and in December of that year he married Wilda. After marrying Wilda

and while his insurance was in force under the provisions added by Public Law 23, 82nd Congress, he completed the DD Form 93, Record of Emergency Data, dated October 25, 1954, upon which he first listed Wilda as beneficiary for "100%." This form has information on it to the effect that it did not change the beneficiary designation for insurance. However, it is settled by court decisions that the use of the improper form does not warrant disregarding the serviceman's intent if the completion of the designation on the form was for the purpose of changing an insurance beneficiary designation. The statement of the witness to this form shows that it was the intent of the serviceman by the designations thereon to name Wilda as principal beneficiary for his insurance. The witness to the form is not shown to be interested in any way in the disposition of the issue presented on this appeal. It is a known fact that confusion frequently existed as to the proper way to change a beneficiary designation for insurance which was being maintained in force under the provisions of the same statute which made available indemnity or "free insurance" as it was often described by servicemen. The DD Form 93 was frequently used for this purpose. Collateral evidence is acceptable to show it was intended to be used as a change of beneficiary for insurance. The collateral evidence in this case includes the letters written by the serviceman and the Service Department form which he sent to Wilda showing that in December 1956 he was of the opinion he had so arranged his insurance that Wilda would receive the proceeds thereof. In considering the question of what is sufficient affirmative action to change a beneficiary designation one court was

of the opinion that the execution of the form for application of waiver of premiums under the provisions of Section 622 was an affirmative act by which the insured reasonably believed he had changed the beneficiary of his policy and by which he had done everything reasonably within his power to effect the change (Moore vs. U. S. 129 FSupp 456). In the instant case, we also have an appreciable amount of other evidence such as the data form dated October 25, 1954, and the letters written by the serviceman and the statement of the witness to the aforesaid data form.

In view of the foregoing and with consideration given all the evidence, the Board finds that the serviceman changed the beneficiary designation for his insurance from Mary Behrens as principal beneficiary and Billy J. Dinnell as contingent beneficiary to Wilda L. Dinnell as principal beneficiary and Louise Dinnell as contingent beneficiary. It follows, therefore, it is the Board's decision the agency of original jurisdiction properly determined the insurance proceeds are payable to the serviceman's widow, Wilda L. Dinnell, and that entitlement of anyone else to the insurance proceeds is not established. The appeal is denied and this decision constitutes final administrative denial of the claim.

/s/ By WILLIAM C. COLE
Associate Member

/s/ By L. E. IMHOFF,
Associate Member

/s/ By W. N. MORELL,
Associate Member.

Duly Verified.

[Endorsed]: Filed July 12, 1960.

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

The above-entitled action was set for trial before the court, sitting without a jury, on March 7, 1961, the plaintiff being represented by Lerrigo, Thuesen, Thompson & Thompson, Maurice Smith, Esq., appearing; and the defendant Wilda L. Dinnell, being represented by John Said, Esq.

It was stipulated in open court that the case be submitted on the record, including the files and records of the Veterans Administration.

The court, after reviewing the record, finds that the deceased, Henry Dinnell, intended that defendant Wilda L. Dinnell receive the entire proceeds of his National Service Life Insurance policy No. V 1426-22-92 and that he manifested this intention by executing DD Form 93 on October 25, 1954, wherein he listed her as beneficiary for 100% of his insurance. There are other documents and letters, as well as the statement of Sgt. Charles J. Thomas, Jr., that support this finding.

Accordingly, judgment should be entered for Wilda L. Dinnell for the entire proceeds of said policy of life insurance without costs.

Counsel for the defendant is directed to prepare and lodge findings of fact, conclusions of law and form of judgment in accordance with Local Rule 7.

The clerk of this court is directed to forthwith serve copies of this order by United States mail upon the attorneys for the parties appearing in this cause.

Dated: March 9, 1961.

/s/ By M. D. CROCKER,
United States District Judge.

[Endorsed]: Filed March 9, 1961.

[Title of District Court and Cause.]

PROPOSED MODIFICATION OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff herein proposes that Findings of Fact and Conclusions of Law heretofore proposed by defendant be modified in the following manner:

I.

Plaintiff proposes that Finding of Fact No. III be modified to read:

> "That said Henry Dinnell in April 1952 obtained a decree of divorce from the said Mary M. Dinnell; that on December 31, 1952, the said Henry Dinnell entered into a marriage with the defendant, Wilda L. Dinnell, at Rantoul, County of Champaign, State of Illinois; that said Henry Dinnell thereafter did not change the beneficiary on said policy of insurance and the named beneficiary thereunder at all times remained Mary M.

Dinnell; that on October 25, 1954, the said Henry Dinnell did execute United States Air Force Form DD 93, Record of Emergency Data, designating the said Wilda L. Dinnell 'receive each month 100% of my pay' and that the said Wilda L. Dinnell be designated to receive 100% of service man's indemnity under Public Law 23 of the 82nd Congress (gratuity pay and benefits); that said DD Form 93 specifically states: 'Does not operate as a designation or a change of beneficiary of any insurance contracts issued by the United States Government'; that on April 10, 1956, said Henry Dinnell did execute another U.S.A.F. DD 93 Data Form wherein and whereby the said Henry Dinnell did designate said Wilda Lee Dinnell as beneficiary 'for the unpaid pay and allowance (Public Law 147, 84th Congress)' as person to be notified in case of emergency as beneficiary for gratuity pay and as person to receive personal effects for safekeeping; that said U.S.A.F. Form DD 93 (Record of Emergency Data) specifically states therein by specific insertion typewritten, 'not applicable to National Service Life insurance'; that at the date of the death of the said Henry Dinnell on March 23, 1957, the sole beneficiary under the said policy of insurance was and is the named beneficiary of Mary M. Dinnell; that the said Henry Dinnell specifically intended to leave the

said named beneficiary, Mary M. Dinnell on said policy of insurance; that the said Henry Dinnell specifically made each DD Form 93 not applicable to National Service Life insurance beneficiary."

II.

Plaintiff proposes that Conclusions of Law No. 1 be modified to read as follows:

"1. That plaintiff Mary M. Behrens is the named beneficiary under said policy of insurance and is entitled to the proceeds thereof."

"2. That the defendant, Wilda L. Dinnell is not entitled to the proceeds of said insurance policy."

Dated this 8th day of May, 1961.

LERRIGO, THUESEN,
THOMPSON & THOMPSON,

/s/ By MAURICE E. SMITH,
Attorneys for Plaintiff.

Affidavit of Service by Mail Attached.

In the United States District Court
Northern District of California
Northern Division

No. 2020-ND

MARY M. BEHRENS,

Plaintiff,

vs.

UNITED STATES OF AMERICA, WILDA L. DINNELL, et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

This cause came on regularly for trial on the 7th day of March, 1961, before the Court sitting without a jury, a jury trial having been waived by the parties, and Maurice Smith of the firm of Lerrigo, Thuesen, Thompson & Thompson appearing as attorney for the plaintiff, no one appearing for the defendant United States of America, and John Said appearing as attorney for defendant Wilda L. Dinnell; thereupon, Maurice Smith and John Said made statements stipulating that the matter could be considered by the Court on the basis of the record made before the Board of Veterans Appeals, including the files and records of the Veterans Administration; and the Court having examined said entire record before the Board of Veterans Appeals, including the files and records of the Veterans Administration, and the cause having been submitted to the Court for decision, and the Court being fully advised in the premises, now makes its Findings of Fact as follows:

Findings of Fact

I.

That on or about April 1 of 1950, the defendant United States of America issued to one Henry Dinnell, a policy of National Service Life Insurance, the same being Policy No. V 1426-22-92; that in said policy of insurance, said Henry Dinnell designated the plaintiff and his daughter Pasty Ruth, his son Billy Joe, and his stepdaughter Juanita E. Smith, as beneficiaries for Ten Thousand Dollars ($10,000.00); that premiums on said policy were paid by said Henry Dinnell to include July 1, 1951, after which said premiums were waived effective July 1, 1951, pursuant to insurance application for a premium waiver under Section 662 of National Service Life Insurance Act of 1940, as amended (38 U.S.C. §823, 1954 Ed.); that the insurance was again renewed, effective April 1, 1955, for another five-year term; that the said Henry Dinnell died on March 23, 1957, while said policy of insurance was in full force and effect.

II.

That on January 9, 1951, said Henry Dinnell executed a "change or designation of beneficiary of National Service Life Insurance" on Veterans Administration Form 9-336; that said change or designation of beneficiary designated as principal beneficiary one Mary M. Dinnell (now known as Mary M. Behrens, the plaintiff in the foregoing action).

III.

That said Henry Dinnell in April 1952 obtained a decree of divorce from the said Mary M. Dinnell; that

on December 31, 1952, the said Henry Dinnell entered into a marriage with the defendant, Wilda L. Dinnell, at Rantoul, County of Champaign, State of Illinois; that said Henry Dinnell thereafter changed the beneficiary on said policy from said Mary M. Dinnell to defendant Wilda L. Dinnell; that particularly on October 25, 1954, the said Henry Dinnell did sign a DD Form 93, Record of Emergency Data, provided by Public Law 23, 82nd Congress, designating said defendant Wilda L. Dinnell as beneficiary for 100% of the proceeds under the said policy; that on April 10, 1956, said Henry Dinnell did execute another Data Form to the Service Department of the U. S. Air Force, wherein and whereby the said Henry Dinnell did designate said defendant Wilda L. Dinnell as the beneficiary of a number of Service Department purposes; that at the date of the death of the said Henry Dinnell on March 23, 1957, the sole beneficiary under the said policy of insurance was and is Wilda L. Dinnell; that Mary M. Dinnell was not the named, or any, beneficiary of said Henry Dinnell at the time of his death on March 23, 1957.

IV.

That on or about December 29, 1959, the Veterans Administration, Board of Veterans Appeals, denied plaintiff's claim for payment under said policy of insurance; that defendant United States of America admits liability under the said policy of insurance and is

ready and willing to pay the proceeds thereof to the party lawfully entitled thereto.

Conclusions of Law

From the foregoing facts, the Court concludes:

1. That plaintiff Mary M. Behrens is not entitled to the proceeds of said insurance policy;

2. That the defendant Wilda L. Dinnell is entilted to the proceeds of said insurance policy, without costs, but after payment of attorney fees;

3. That Robert C. Summers, Esq. has rendered legal services to the defendant Wilda L. Dinnell, reasonably worth the sum of $150.00; that John Said, Esq. has rendered legal services to the defendant Wilda L. Dinnell, reasonably worth the sum of $850.00 ($100.00 heretofore having been paid as a retainer); and that accordingly, said Robert C. Summers should receive $150.00 out of the proceeds of said insurance policy, and that said John Said should receive $750.00 additional out of the proceeds of said insurance policy.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law, It Is Ordered, Adjudged and Decreed:

I. That plaintiff Mary M. Behrens take nothing by this action;

II. That the defendant Wilda L. Dinnell have judgment against the plaintiff Mary M. Behrens and the defendant United States of America in the sum of $10,000.00, and that the defendant United States of America pay to defendant Wilda L. Dinnell the sum of $9,100.00, to Robert C. Summers, Esq. the sum of $150.00, and to John Said, Esq. the sum of $750.00.

May 12th, 1961

/s/ By M. D. CROCKER,
United States District Judge.

Disapproved as to form:

LERRIGO, THUESEN,
THOMPSON & THOMPSON,

/s/ By MAURICE E. SMITH,
Attorneys for Plaintiff

LAUGHLIN E. WATERS,
United States Attorney

DONALD A. FAREED,
Assistant U. S. Attorney
Chief, Civil Division.

/s/ By RALPH F. BAGLEY JR.,
Assistant U. S. Attorney

Attorneys for defendant
United States of America.

[Endorsed]: Lodged May 11, 1961. Filed May 12, 1961. Entered May 15, 1961.

United States District Court
Southern District of California
Office of the Clerk
Room 231, U. S. Post Office & Court House
Los Angeles-12, California.

Summers & Watson, Attorneys at Law, 501 W. Church Street, Champaign, Illinois; John Said, Attorney at Law, 201 Security Bank Building, Fresno 21, California; Lerrico, Thuesen, Thompson & Thompson, Attorneys at Law, 804 Security Bank Building, Fresno 21, California, Attn. Maurice Smith; Donald A. Fareed, Assistant U. S. Attorney, Chief, Civil Division, Federal Building, Los Angeles 12, California, Attn: Ralph F. Bagley, Jr.

Re: 2020-ND Mary M. Behrens v. United States & Wilda L. Dinnell et al.

You are hereby notified that Judgment in the above-entitled case has been entered this day in the docket.

Dated: May 15, 1961.

CLERK, U. S. DISTRICT COURT,
/s/ By C. A. SIMMONS,
Deputy Clerk.

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT

To the Plaintiff, Mary M. Behrens, and to Lerrigo, Thuesen, Thompson & Thompson, her attorneys, and to the defendant United States of America and to Messrs. Donald A. Fareed and Ralph F. Bagley, Jr., of the United States Attorney's Office, its attorneys:

You, and Each of You, Will Please Take Notice that judgment in the above-entitled action, in favor of defendant Wilda L. Dinnell, and against plaintiff Mary M. Behrens and the defendant United States of America, was duly given, made and entered in the records and docket of the above-entitled Court on the 15th day of May, 1961.

SUMMERS & WATSON, and
JOHN SAID,
/s/ By JOHN SAID,
Attorneys for defendant,
Wilda L. Dinnell.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed May 22, 1961.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT COURT OF THE NINTH CIRCUIT

To the Clerk of the Above Entitled Court:

Notice Is Hereby Given that Mary M. Behrens, the plaintiff herein, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Judgment entered in this action on the 15th day of May, 1961.

Dated this 5th day of June, 1961.

LERRIGO, THEUSEN,
THOMPSON & THOMPSON
Attorneys for Plaintiff,
/s/ By MAURICE E. SMITH.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 15, 1961.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the foregoing documents together with the other items, all of which are listed below, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

Page:

56 Defendant Wilda L. Dinnell's Notice of entry of judgment, filed 5/22/61

59 Notice of Appeal, filed 6/15/61

62 Designation of record on appeal, filed 6/15/61

Dated: July 11, 1961.

[Seal] JOHN A. CHILDRESS,
Clerk

/s/ By WM. A. WHITE,
Deputy Clerk

[Endorsed]: No. 17458. United States Court of Appeals for the Ninth Circuit. Mary M. Behrens, Appellant vs. United States of America, and Wilda L. Dinnell, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed July 12, 1961.

Docketed July 17, 1961.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the Ninth Circuit.

Nos. 17460-17461

IN THE

United States Court of Appeals

For the Ninth Circuit

PACIFIC QUEEN FISHERIES, *et al.*,

Appellants,

vs.

L. SYMES, *et al.*,

Appellees.

PACIFIC QUEEN FISHERIES, *et al.*,

Appellants,

vs.

ATLAS ASSURANCE COMPANY, *et al.*,

Appellees.

APPELLANTS' BRIEF

WILBUR E. DOW, JR.,
W. SHELBY COATES, JR.
DOW & STONEBRIDGE,
80 Broad Street,
New York 4, New York;

ROBERT W. COPELAND,
HAPPY, COPELAND & KING,
Rust Building,
Tacoma, Washington;

ALLAN E. CHARLES,
LILLICK, GEARY, WHEAT,
ADAMS & CHARLES,
311 California Street,
San Francisco 4, California;

Attorneys for Appellants.

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Nos. 17460-17461

IN THE

United States Court of Appeals

For the Ninth Circuit

PACIFIC QUEEN FISHERIES, *et al.*,

Appellants,

against

L. SYMES, *et al.*,

Appellees.

PACIFIC QUEEN FISHERIES, *et al.*,

Appellants,

against

ATLAS ASSURANCE COMPANY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF FOR APPELLANTS, PACIFIC QUEEN FISHERIES, et al.

Jurisdiction

The jurisdiction of this Court rests upon 28 U. S. C. § 1291 by reason of a Notice of Appeal, filed April 14, 1961 (R. Vol. 1, p. 296) from a Final Judgment for defendants filed and entered March 23, 1961 (R. Vol. 1, pp. 288-290).

Original jurisdiction of these cases was vested in the District Court under the provisions of 28 U. S. C. § 1332 by reason of diversity of citizenship and amounts (R. Vol. 1, p. 249). Although the pleadings passed out of the case upon the

entry of Pre-Trial Order Number One (R. Vol. 1, p. 221), the pleadings will be referred to later in this brief in connection with discussion of the denial of jury trial by the District Court.

Questions Presented

Pacific Queen Fisheries, a partnership, owned the diesel fishing vessel *Pacific Queen* which became a constructive total loss on September 17, 1957 (R. Vol. 1, pp. 198-199). Prior to her loss, Pacific Queen Fisheries, hereinafter sometimes referred to as "Fisheries," obtained insurance insuring *Pacific Queen* against loss in the sum of $325,000 and each of several gillnet fishing boats carried aboard in the agreed amount of $5,000 each (R. Vol. 1, p. 199). Following the loss of the vessel, two of her gillnetters and damage to a third gillnetter, Fisheries furnished defendant insurers, hereinafter sometimes referred to as "Insurers", proof of the aforementioned losses and abandoned the vessel to defendants (R. Vol. 1, p. 199). Insurers agreed that the vessel was a constructive total loss, but declined tender of abandonment (R. Vol. 1, pp. 199-200). Insurers have not paid to Fisheries any part of the insurance on *Pacific Queen,* or on two lost and one damaged gillnetter, although payment has been duly demanded (R. Vol. 1, p. 201).

Insurers raised the following alleged legal defenses in substantiation of their position that the losses were not covered by the insurance:

1. Fisheries concealed from Insurers circumstances material to the risk.

2. The *Pacific Queen* was, with the privity of the assureds, sent to sea in an unseaworthy state.

3. The loss and damage resulted from want of due diligence by the owners of the vessel.

4. Fisheries breached an implied warranty that the adventure insured was a lawful one, and that, so far as the

assureds were able to control the matter, the adventure was to be carried out in a lawful manner.

Whether or not any of these defenses may stand, under all the circumstances of this case, is the basic question presented on this appeal. Collateral questions include whether or not a contractual time bar advanced by one of the Insurers should be given effect and whether plaintiffs were rightfully denied a trial by jury.

Statement of the Case

1. The Opinion, the Findings and the Testimony

As far as possible the circumstances surrounding the destruction of *Pacific Queen* will be recounted from facts found by the District Court and from testimony given at the trial considered by the District Court to have been credible and authoritative. In addition to citing page numbers in the Record, we shall indicate the sources of the evidence cited wherever possible.

The lower court, in its Finding of Fact No. 7 (c) (R. Vol. 1, pp. 254-255), stated:

> "Upon a careful examination of all of the proceedings before the Coast Guard, and of various depositions received in evidence in these cases, and upon hearing, observing and weighing all of the evidence of the witnesses who testified at the trial of these cases, the Court finds that the substance of said Findings of Fact and Conclusions (of fact) of the Coast Guard (Ex. 30, 31, 32) are true and correct, and hereby incorporates them by reference and adopts them as its own."

Although we do not agree with certain conclusions of fact reached by the Coast Guard investigator, we shall refer liberally to his report (R. Vol. 3, pp. 1051-1087) in making our

statement of the pertinent facts, using the abbreviation "C. G." to indicate that this report is being cited. Where the Court's opinions or its Findings of Fact or Conclusions of Law are cited, the abbreviations "Op.", "F. F.", and "C. L." will be employed, respectively.

2. The Facts

The *Pacific Queen,* owned and operated by Pacific Queen Fisheries of Tacoma, Washington, a partnership, was built in 1943 and, at the time of her loss, was licensed for the fishing trade. She was built of wood and steel, was propelled by twin screw diesel engines, had a registered length of 173 feet, a beam of 37 feet, a depth of 18.8 feet, and a gross tonnage of 988 tons (C. G., R. Vol 3, pp. 1052-1053). She had originally been constructed for the United States Navy as a salvage vessel, but, after being bought as war surplus from the government in 1948 by an individual who resold her to Pacific Boatbuilding Company, a corporation then controlled by one of Fisheries' partners, which, in turn resold the vessel in 1949 to Fisheries (F. F., R. Vol. 1, pp. 252-253), the vessel was converted for use as a "mother ship" for a fleet of gasoline powered gillnet motorboats (C. G., R. Vol. 3, p. 1054).

The vessel possessed several brine tanks and refrigerated holds for the purpose of freezing the catch. The freezing was accomplished through the use of an ammonia refrigeration system which used approximately 700 pounds of ammonia (C. G., R. Vol. 3, pp. 1054-1055). *Pacific Queen* was also equipped to carry, in four steel tanks located below deck in the after end of the vessel, gasoline to be utilized by her gillnetters during fishing operations (C. G., R. Vol. 3, pp. 1058-1059). Of the four steel gasoline tanks, the two after ones were originally Navy equipment. The two forward ones were installed after purchase from the Navy and were originally intended for and used for the purpose of carrying additional diesel fuel. Although the exact date has never been estab-

lished, sometime before the beginning of the 1957 Fishing season, and possibly as early as 1955, the two forward tanks were emptied of their diesel fuel, connected with the two after tanks to enable all four to carry gasoline and the tanks' discharge systems were altered to what the lower court considered a more "hazardous" method of discharge (F. F., R. Vol. 1, pp. 259-260). A more detailed picture of *Pacific Queen*'s construction characteristics will be set out in following sections of this brief and will be clarified at the time of oral argument through the use of a large model which was admitted as an exhibit at the trial.

Beginning in 1950, Fisheries operated *Pacific Queen* between Puget Sound and Bristol Bay, Alaska, as a refrigerated vessel to freeze and transport catches of salmon from Alaska to ports on Puget Sound, Washington. Until 1951, regulations of the U. S. Fish and Wildlife Service prohibited the use of power-driven fishing boats in Bristol Bay. This was a fish conservation measure. In 1951, this regulation was relaxed and power boats up to 32 feet in length were permitted (F. F., R. Vol. 1, p. 255). During the years beginning at 1950, Fisheries insured the vessel with various insurance companies including some of the defendants which insured the vessel in 1957 (F. F., R. Vol. 1, p. 256). The *Pacific Queen* did not engage in Alaska operations in 1956, but remained in lay-up status (F. F., R. Vol. 1, p. 258).

The *Pacific Queen* commenced outfitting preparations for the 1957 Alaskan fishing season at Tacoma, Washington, during the month of April, 1957 (C. G., R. Vol. 3, p. 1060). Incident to the procurement of insurance for the 1957 season, a condition survey of the *Pacific Queen* was made by a representative of United States Salvage Association (F. F., R. Vol. 1, p. 258) and insurance certificates were issued and delivered, the premium being paid in full (Op., R. Vol. 1, p. 230). Around the 25th of May, 1957, the vessel proceeded to Seattle, Washington. During the period 25th to 27th May, 1957, the vessel completed her outfitting and, as a part of these preparations, the vessel loaded approximately 7,510

gallons of gasoline in bulk at the Shell Oil Fueling Dock on Harbor Island. This gasoline was loaded into the four under-deck steel tanks previously referred to (C. G., R. Vol. 3, p. 1060).

On May 27th, the vessel took its departure from Seattle and proceeded to Alaskan waters (C. G., R. Vol. 3, p. 1060). While operating in the Bristol Bay area, the gillnetters, each manned by a crew of fishermen, periodically departed from the mothership, brought in a catch, returned to the mothership which relieved them of their cargoes of fish, refueled from her gasoline supply and were sent back out for more salmon. (C. G., R. Vol. 3, p. 1054). Refueling was accomplished by means of an electrically powered gasoline pump which took suction from any one of the four internal tanks through a neoprene hose (C. G., R. Vol. 3, p. 1059).

Upon completion of the fishing season, the vessel left Alaskan waters and proceeded to the Puget Sound area, where, on or about August 17, 1957 she commenced off-loading gear and fish at various points in the Seattle-Tacoma area (C. G., R. Vol. 3, p. 1060. As the insurance certificates contain a warranty that the vessel be "laid up nine (9) consecutive months at Port of Seattle, Washington" (R. Vol. 1, p. 84), an additional 30 day period of insurance coverage was obtained on September 5th (R. Vol. 1, p. 84) in order to ensure operating insurance coverage during a period when the *Pacific Queen* would be broken out of lay-up for further discharging of fish and gear (Galbreath, R. Vol. 2, pp. 777, 793-794).

The next day the vessel proceeded to Friday Harbor, San Juan Islands, Washington, and tied up at the Friday Harbor Packing Company pier where she remained unloading fish until the evening of September 11th. At approximately 0500 hours on the morning of September 9th (Petrich, R. Vol. 2, pp. 547-548, as to date) the vessel's cook, Hutton, in the course of arising to commence preparations for breakfast, noticed the odor of gasoline fumes. A brief investigation on

his part disclosed that the area of the first deck around the gasoline tanks in the stern portion of the ship appeared to be covered with several inches of gasoline. Hutton immediately advised the personnel of the ship, and Radin (the Captain) and Jasprica (the Chief Engineer), when apprised of the situation, ordered the crew off the vessel. No power equipment was started up. In excess of 100 gallons of gasoline were spilled from one of the gasoline tanks in the reefer flat area and this gasoline passed through apertures of the first deck into the shaft alley recess beneath. Radin and Jasprica, together with selected members of the crew, then took steps to remove the gasoline from the shaft alley recess (C. G., R. Vol. 3, pp. 1060-1061). These steps were described in the Coast Guard report (C. G., R. Vol. 3, pp. 1061-1062) as follows:

> "* * * In an attempt to rid the reefer flat and shaft alley bilge areas of gasoline, cold water, sprayed through a hose, was used to wash down the area. After removal of visible traces of gasoline the area involved was again washed down with cold water, and a bilge cleaning solvent was used in an effort to remove the gasoline from the wooden hull. Portable blowers were used to remove the gasoline fumes from the vessel, one of these blowers being borrowed from the Friday Harbor Volunteer Fire Department. On the evening of 10 [9?] September, 1957, the vessel's main engines were started and the ship's ventilation blowers were placed into operation to free the vessel from gasoline fumes."

Plaintiff August Mardesich was the Manager of the *Pacific Queen* in 1957, although he was not quartered or employed aboard the vessel in any capacity, (F. F., R. Vol. 1, p. 261). In fact, during the fishing season of 1957, he sailed aboard another freezer vessel, *North Star,* and had been its Manager from 1951 through 1957. His managerial role in connection with *Pacific Queen* was primarily in the realm of finance and banking (Mardesich, R. pp. 325, 337, 1608, 1637). Mardesich,

who had come to Friday Harbor on the day of the gasoline spill to check on the amount of fish being off-loaded and canned at a nearby cannery, went aboard *Pacific Queen* at which time Jasprica informed him of the spill (Jasprica, R. Vol. 4, p. 1553). Mardesich, in the company of Jasprica, then inspected the lower spaces of the vessel and surveyed, to his satisfaction, the steps that had already been taken to purge the vessel of the spilled gasoline (Mardesich, R. Vol. 3, pp. 979-982; Jasprica, R. Vol. 4, p. 1582).

On the evening of September 11th, the vessel departed Friday Harbor and proceeded to the Seattle area where it unloaded fish for Helvita Food Products (Jasprica, R. Vol. 2, p. 557), eventually tying up at the Ballard Oil Dock on Lake Union. On September 15th *Pacific Queen* left Seattle and proceeded to Tacoma where she tied up at "Old Town Dock" at approximately 1635 hours. The remainder of the vessel's crew was paid off, the majority of the crew having left the vessel prior to the move to Tacoma. Three men—Jasprica, Medak and Weber—remained on the vessel for the purpose of securing the ship and preparing her for winter storage (C. G., R. Vol. 3, pp. 1062-1063).

The next day, September 16th, the three men worked on and about the ship and the main engine plant was started up in order that light and power be available (C. G., Vol. 3, p. 1063-1065). Part of the work accomplished on board this day included the removal of one of the vessel's auxiliary ship's service diesel generator units which was located on the upper platform of the engine room on the port side at approximately frame No. 52. The description of the removal of this diesel engine in the Coast Guard report is found at pages 1065-1066 of the Record as follows:

> "* * * The generator portion of this unit had been removed prior to this time while the vessel was laying in Friday Harbor, Washington, and it was the intention of the men at this time to remove the diesel engine. In order to do this, it was found necessary

to remove a steel oil guard which ran around the unit on the deck and extending up some three inches for the purpose of retaining spilled oil, etc., in the neighborhood of the set. In the course of this work, Weber brought down the ship's oxygen-acetylene hose, torch and associated equipment. The combination oxy-acetylene hose led up from the engineroom to the port side of the main deck aft on the after corner of the superstructure house where it connected to the vessel's oxy-acetylene bottles which were installed at this point by the use of brackets, etc. At approximately 1430 hours, Weber commenced cutting off the oil guard on the deck around the auxiliary diesel generator unit. In the course of this, sparks from the cutting work went down through the upper steel platform deck of the engineroom and fell onto one of the structural wooden beams of the vessel which ran underneath the upper level deck. The sparks were able to pass through the upper deck plating of the engineroom because of the fact that holes had been cut in this plating, irregularly spaced, at some prior time to permit the flow of grease, oil, etc., from the upper level down into the bilges of the engineroom. This was accomplished in the manner described previously for the reefer flat deck area. There was a rag laying on the top of this beam and as a result of the sparks down in this area, the rag was ignited. Jasprica was in the lower level of the engineroom at this time and, observing the fire, obtained a portable CO_2 fire extinguisher and used it to extinguish the fire. In addition to this, Medak who was on the upper level with Weber used a two-gallon bucket of water and poured it on the upper deck in way of the cutting work. Shortly after this, with no further incident, the removal of the oil guard was completed and at about 1700 hours the three men secured for the day. * * *"

After securing the main plant, the men made preparations to go ashore. The shore power connection was not con-

nected on board the ship at this time as Medak suggested that the vessel's lights might attract passers-by to the ship. The three men proceeded ashore together in the early evening, Jasprica and Medak returning at 2215 hours (C. G., R. Vol. 3, p. 1067). According to the sworn statement given by Medak at Police Headquarters immediately following the loss of the vessel, which statement is an exhibit to Exhibit 391 (deposition of the Coast Guard investigator):

> "Jasprica said good-night, left the ship to spend the night with his mother and I went to my bunk and went to bed. I do not know whether Weber had returned to the ship as I didn't look in on him before retiring."

It is known that Weber spent some time in the Spar Tavern, a beer tavern located near the city dock. At approximately 2200 hours Weber left the tavern with the announced intention of returning to the *Pacific Queen* (C. G., R. Vol. 3, p. 1067).

The Coast Guard report continues at page 1067 of Volume 3 of the Record:

> "At approximately 0400 hours on the morning of 17 September, 1957, a violent explosion occurred on board the *Pacific Queen*. This explosion hurled portions of the vessel several hundred yards away, broke plate glass windows in various establishments in the surrounding area, and was felt as a distinct jar by members of the crew of Brown's Point Light Station, across Commencement Bay to the northeast, some two miles distant."

This explosion ripped open the vessel's hull planking on the port after side of the engineroom at the turn of the bilge and a large section of the vessel's main deck aft of the superstructure, together with associated equipment such as brine tanks, hatches, manhole covers and a gillnet boat, was blown off and into the water. Smoke and flames arose from the vessel just aft of her superstructure, and, in a very short

time, spread from the after end of the superstructure all the way back to the vessel's stern (C. G., R. Vol. 3, p. 1068). *Pacific Queen* ultimately settled on the bottom with a 10° list to the starboard (C. G., R. Vol. 3, p. 1070).

The explosion had originated in the upper level of the engineroom at approximately the level of the catwalk, in the neighborhood of the forward corner. The source of ignition for the explosion is not known at the present time, and, in all probability, never will be determined (C. G., R. Vol. 3, p. 1082). In the words of the lower court's Findings of Fact, (R. Vol. 1, pp. 269-270) "[i]t could have been a spark from a cigarette, or a match, or an electrical contact, or other accidental source."

Specification of Errors

Forty-eight alleged errors on the part of the lower court have been specified in our "Statement of Points" found at Volume 1, pages 297a-297h, of the Record. Of these, only Nos. 1, 3, 14 and 47 are no longer considered germane to this appeal, and the rest are incorporated by reference herein as if fully set forth. In the argument following hereafter, many of the specified errors will be consolidated under certain main points of argument.

Statement Concerning the Law Applicable

The lower court, a little over a month in advance of the commencement of the trial, passed upon the effect of the following provision found in the American Hulls (Pacific) clauses which are attached to the certificate of insurance covering the hull (R. Vol. 1, p. 83) and to one of the policies (R. Vol. 1, p. 75):

> "(c) Warranted to be subject to English Law and usage as to liability for and settlement of any and all claims."

The trial judge's memorandum decision on this question may be found at pages 224-226 of the record and his con-

clusion of law, following the trial, that "English Law and Usage Governs" is set out at pages 279-280 of the record.

Plaintiffs do not dispute that the highest court of the State of Washington has sanctioned stipulations for foreign law, under certain circumstances, as has the United States Supreme Court. See: *Crawford* v. *Seattle R. & S. R. Co.,* 86 Wash. 628, 150 P. 1155, L. R. A. 1916 D; *Lesicich* v. *North River Insurance Co.,* 191 Wash. 305, 71 P. 2d 35 (1937); *London Assurance Co.* v. *Companhia de Moogens do Barreiro,* 167 U. S. 149 (1896). As stated in a Note at 62 Harv. L. Rev. 647 (1949) discussing stipulations in contracts as to governing law:

> "To some extent every state has given recognition to the expressed or implied intent of the parties."

The author of this Note, states, however, at page 651:

> "In insurance contract cases, as a logical consequence of the unequal bargaining atmosphere, the courts have shown unusual solicitude for the interest in protecting the resident insured from foreign insurance corporations."

In a recent federal case, *Landry* v. *SS Mutual Underwriting Association,* 177 F. Supp. 142 (D. C. Mass. 1959), affirmed 281 F. 2d 482 (1st Cir. 1960), the court, in construing a P & I policy on a Massachusetts fishing vessel, found that English law governed the interpretation and construction of the contract. The court stated at page 146, however, that "since there do not seem to be any English authorities which are precisely in point, the substantive questions must be resolved largely upon general principles of construction which are not different in England from those used in this country."

With the above in mind, this brief will cite American authority where it is felt that English law has not adequately covered the field in question or where the American law affords a supplementary view.

ARGUMENT

I

The Court erred in failing to conclude that Insurers had the burden of showing the source of ignition which they admit they failed to show.

In *Hart-Bartlett-Sturtevant Grain Co.* v. *Aetna Ins. Co.*, 293 S. W. 2d 913 (Sup. Ct. Utah 1956), where the assured brought an action on policies covering loss of grains and loss due to interruption of business resulting from an alleged explosion, the court, at page 922, stated:

> "Plaintiff had only the burden of proving there was an exlosion. Plaintiff did not have any burden of proving in what particular way the explosion was caused."

The *Hart* case cited *Hartford Fire Ins. Co.* v. *Empire Coal Min. Co.*, 30 F. 2d 794 (8th Cir. 1929), which construed an insurance policy as covering damages resulting from an underground explosion, rather than damages resulting only from inability to maintain pumping service. The Court in this case, at page 801, considered the matter of presumptions in explosion cases as follows:

> "* * * It is further contended by counsel for defendant that the jury could not have reached the conclusion that there was an explosion without basing presumption upon presumption, and that this is not allowable. The rule cited is well established, but we think it is not applicable to the case at bar. The contention of counsel confuses the question, was the fire caused by an explosion? with the entirely different question, in what particular way was the explosion caused. It was incumbent on the plaintiff to prove the affirmative of the former question. No burden rested upon the plaintiff to answer the latter question. The answer to the second question might involve not only numerous facts, but also several presumptions. The answer to the first question involved a single inference from numerous established facts. * * *"

As has been stated, no one, including the lower court, claims to know the source of ignition for *Pacific Queen's* explosion. One possible candidate, arson, was peremptorily excluded by the lower court (F. F., R. Vol. 1, p. 269), in spite of the existence of startling circumstantial evidence, which evidence will be reviewed hereunder.

Medak, in his sworn statement (Exh. No. 4 to trial Exh. No. 391) given at Police Headquarters only six hours after the explosion, stated:

> "The next thing I remember was being blown out of my bunk at the time of a loud explosion. Mine is the only bunk in the room as it is a very small room. The door was jammed with debris and I had a hard time getting it to open. By this time, the flames were coming in the port hole on the deck side of the ship and I barely got out without getting burned. I went into the passage way and the flames were so bad on the deck side that I had to go the other way. On reaching the starboard side, I heard Webber screaming, 'Please help me out—break the door in'. I tried to force the door but it was apparently blocked by something and would not give. Then I didn't hear anymore from Webber. His room is on the starboard side and way back along side the stack where the blowers and exhaust system is located. In order for him to escape, he would have had to go through a stateroom containing four bunks to get into the passageway. When I got out in front of the cabins, there were two young men standing *on deck* by the fish hold and they asked me how many men were on the boat and whether I needed help. * * *" (Emphasis added.)

One of these men was subsequently identified as Donald R. Dahl of Tacoma, Washington (C. G., R. Vol. 3, pp. 1078-1079), a man that the Tacoma fire department and police had had under suspicion and surveillance in connection with

other fires in the city of Tacoma (Heymel, R. Vol. 4, pp. 1489-1490). Mr. R. K. Heymel, Deputy Fire Marshal of Tacoma and one of Insurers' expert witnesses, testified as follows at pages 1490, Vol. 4 of the Record:

> "A. One, we can suspect him of most any fire downtown, because he is a night rover, and he is there among the first group that shows up at a fire.
>
> Q. Would that be Mr. Dahl?
>
> A. Mr. Dahl."

The Tacoma Police Department "Information Report" (C. G., R. Vol. 3, p. 1086) which is Exhibit No. 12 of the Coast Guard investigator's report, contains much that substantiates Mr. Heymel's comments concerning Mr. Dahl and which makes one "really wonder". This report, in part, reads as follows:

> "* * * NASH & SAMEUELSON [Police Officers] ran out onto the dock and noted 4 persons out on the North end of the dock about 75 feet from the boat which was burning. One of these 4 was DON R. DAHL, TFD 9961; a second party was later identified as NICK T. MEDAK, seaman from the *"Pacific Queen"* which was burning, a third party was a sailor in blue uniform and the fourth party was an unidentified civilian. * * * At 4:12 A.M., Officer NASH called Sgt. DESKINS attention to DON R. DAHL who was wandering around near the South End of the dock approach. Both NASH and Sgt. DESKINS noted that he was intoxicated and Sgt. DESKINS recognized this subject from past arrests. He was immediately taken into custody, shaken down, and questioned as to his presence at the scene. At first DAHL refused to identify himself, stating 'Chief Fisk knows me' [Tacoma Fire Chief. See: R. Vol. 3, p. 1016]. When asked to explain his presence, he stated to NASH & DESKINS that he had been driving north on MCCARVER St. and when he crossed No. 30th St., the

> explosion occurred aboard the *"Pacific Queen."* He stated he immediately drove his car, a 1949 Lincoln Fordor Sedan, Lic 13461 B, Grey in color, out onto the dock and up next to the burning ship. He then stated he boarded the ship and attempted to help someone else on board free a trapped man, but being unsuccessful, he left the ship and drove his car back out to the dock approach. He then stated he ran back out onto the dock. When queried as to where he had been before he drove his vehicle out onto the dock, DAHL said 'Do I have to tell you that?' When answered in the affirmative, he refused to state any of his movements prior to arriving at No. 30th and McCarver. He did state, in answer to a question, that he had had 'Two drinks' earlier in the evening, but steadfastly denied being intoxicated.
>
> DAHL staggered when walking, his eyes were glassy, and he smelled of intoxicants * * *.
>
> It should also be noted that DON R. DAHL insisted two or three times that his name be kept out of any publicity surrounding the fire, but did not explain his request. * * *"

Not having established any particular source of ignition, the burden rests on Insurers to exclude, by a preponderance of evidence, all reasonable theories advanced by the assureds as to this source. The fact that such a theory is based upon circumstantial evidence should not detract from its weight. Insurers have not even made a try at rebutting, with concrete evidence, the inference of arson which has been raised.

The insurance certificates at issue contain, in part, the following clause (R. Vol. 1, p. 74), commonly found in English policies, enumerating many of the areas of the certificates' coverage:

> "Touching the Adventures and Perils which we, the said Assurers, are contented to bear and take upon us,

> they are of the Seas * * * Fire * * * and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Vessel &c., or any part thereof."

Arson is a covered peril under the above wording. As stated by Lord Summer in *Samuel* v. *Dumas,* (1924) A. C. 431, 466:

> "A ship is none the less burnt and destroyed by fire because the striking of a match was an act of arson."

See *Arnould on Marine Insurance,* 15th Ed., Vol. 2, p. 774, footnote 88. That such a fire precipitated an explosion and further fire would in no way detract from the coverage.

II

The Court's finding that the destruction of the vessel was the result of a gasoline explosion is clearly erroneous.

The lower court stated in its oral opinion (R. Vol. 1, p. 243) that "[i]t was a gasoline explosion according to the overwhelming preponderance of the evidence that has been submitted to me." For the purposes of the argument under this point, and others to follow in this brief, we shall assume that arson, as a possible cause, has been excluded as a reasonable possibility, although, in actuality, we feel that such is not the case.

In determining what fuel fed the explosion, it is important to consider in further detail the various equipments carried on board *Pacific Queen* and the nature and the extent of the shipboard damage caused by the explosion. The vessel's four internal gasoline tanks were found to be unruptured, with no evidence of explosion or fire damage (C. G., R. Vol. 3, p. 1074). The reefer flat area in general, where these tanks were located, with the exception of the overhead, showed relatively little fire damage except on the deck area

in line with the after watertight door to the engine room (C. G., R. Vol. 3, p. 1077). The ship's ammonia receivers, located in the shaft alley into which gasoline was spilled at Friday Harbor, showed no evidence of fire or explosion damage (C. G., R. Vol. 3, p. 1073). Mr. Knisely, one of Insurers' expert witnesses, examined the ammonia refrigeration system on the *Pacific Queen* after the explosion and "found the pressure vessels, the chambers that held ammonia and ammonia gas intact, but *the piping was badly broken up.*" (R. Vol. 2, pp. 673-674). (Emphasis added.)

The explosion, it must be remembered, originated in the upper level of the engine room, at approximately the level of the catwalk, in the neighborhood of the forward port corner (C. G., Vol. 3, p. 1082). At the trial, one of the assureds' experts, Captain Francis W. Buckler, to whose factual testimony Captain Lees, Insurers' corresponding expert, expressly agreed in all particulars (R. Vol. 1, p. 369), was asked to describe a photograph taken in the engine room. His description reads:

> "This photograph is taken in the port forward upper area of the engine room showing the port side of the bulkhead blown into the cargo compartment away from the engine room, numerous courses of piping and lines hanging with a ruptured ammonia line coming into the port side."

This line, observed Captain Buckler, "comes out of the refrigeration system from the cargo hold" (R. Vol. 1, pp. 386-387). There were "slight indications of melting existing in the end of the line" (Buckler, R. Vol. 1, pp. 387-388).

The next question that comes to mind is: Was ammonia present in the aforementioned piping at the time of the explosion? The lower court conceded that there was "ammonia odor at the scene of the catastrophe" (F. F., R. Vol. 1, p. 270). The strength of this odor is indicated by the following statement found in the Coast Guard investigator's report (C. G., R. Vol. 3, pp. 1071-1072):

> "At about 0430 hours, with the vessel heavily ablaze, Chief Fisk of the Tacoma Fire Department and Palmer Paris (2150561) BMC, USCG, OinC of the CG-83527, together with the men from the Fire Department, boarded the vessel in an effort to rescue Weber and also to determine the location of the fire with an eye to effective extinguishment. While they were on board the ship the smell of ammonia became evident, and as the men attempted to enter the superstructure through the starboard amidships door the ammonia became so strong that they were unable to do so. At about this time the ship, which was in the process of settling on the bottom, suddenly listed to starboard, and the men decided that their position was unsafe. They withdrew from the vessel. The ammonia fumes then spread from the ship and became noticeable to people on the dock, particularly in the area near the stern of the vessel * * *"

If the ammonia fumes were this pungent and prevalent thirty minutes after the explosion and after much of the ammonia liquid and vapor had been presumably consumed in a raging fire, one can only conclude that ammonia was present, at the moment of the explosion, in a goodly quantity.

The lower court found that *Pacific Queen's* ammonia system "had previously been completely pumped down" (F. F., R. Vol. 1, p. 271) but there is no evidence to support the use of the word "completely" in this finding. Even Captain Lees, one of Insurers' expert witnesses, admitted "that it is true that even after a system is pumped down and coils are opened for repairs, there is a strong odor of ammonia" (Lees, R. Vol. 3, 871). There was abundant testimony to the effect that "pumping down" does not entirely void the system and that ammonia reaccumulates in the pipes and coils (Buckler, R. Vol. 2, pp. 442, 451).

The presence of abundant ammonia being apparent, what, then, could have exploded it? The evidence is clear that a

fire broke out in the engine room an appreciable amount of time before the explosion. The testimony of Mr. E. L. Smith, Chief Deputy State Fire Marshal for the State of Washington (R. Vol. 2, pp. 459-461), who, because his Chief happens to be the State's Insurance Commissioner, is, for all practical purposes, the Chief Fire Marshal of the State of Washington, is particularly noteworthy. The lower court volunteered at the trial that Mr. Smith was a "man of extended experience" and "whose experience is well known to me" (R. Vol. 2, p. 475). Mr. Smith upon examining the raised hulk of *Pacific Queen,* observed that there was a difference in the depth of char along a line where the engine room forward bulkhead had come up against the hull prior to its having been blown forward into the refrigerator hold. That the char on the engine room side of the old bulkhead line was much deeper and darker than that forward of the line is apparent from photographs, which Mr. Smith analysed for the trial court (Exhs. 41 and 42, R. Vol. 2, pp. 462-463). These photographs will be produced at oral argument at which time they will be further analysed for the benefit of the Appellate Court by Fisheries' counsel.

The char under the bulkhead flange (F. F., R. Vol. 1. p. 271) is explicable. As originally set properly against the hull, according to one of Insurers' experts, the forward engine room bulkhead had between it and the hull a layer of oak caulking material (Spaulding, R. Vol. 2, p. 823). According to Mr. Smith, "it wouldn't take too long for that caulking to burn out, and the charring would be just as severe there as it was on the after side of the bulkhead" (R. Vol. 3, p. 909).

That ammonia will explode or detonate violently is not in dispute. As stated in the N. F. P. A. Handbook of Fire Protection (Heymel, R. Vol. 3, p. 1023; R. Vol. 3, p. 1489):

> "Ammonia gas is not easily ignited, but may be explosive when mixed with air (explosive range 15% to 28%F.). The presence of hydrogen gas, as an im-

> purity in the ammonia, or due to decomposition of the ammonia or lubricating oil used in the equipment adds to the explosive hazard."

Ammonia is currently being used as a rocket fuel (Sax, R. Vol. 2, p. 509) and can detonate (Knisely, R. Vol. 2, p. 678; Moulton, R. Vol. 2, p. 751). Dr. Moulton, one of Insurers' experts, mentioned at the trial that he had direct knowledge of the ammonia explosion which took place "[a]bout eight years ago" on a tuna clipper named the *Comet* which, as a result of the explosion and fire, sank off the coast of South America (R. Vol. 2, p. 747).

How does gasoline stack up as a competing candidate for being the fueler of the *Pacific Queen* blast? There are innumerable factors which rule out gasoline. Before taking these up, seriatim, the lower court's theory that the "peculiar internal system of ventilation and the path of air on the *Pacific Queen* unaided by mechanical ventilation" scooped up remnant vapors in the allegedly gasoline impregnated wooden members in the shaft alley recess, into which gasoline had spilled at Friday Harbor eight days previously, all of which "resulted in the presence in the upper port forward engine room of an explosive mixture of gasoline vapors with air" (F. F., R. Vol. 1, pp. 271-272), must be stated.

Firstly, it must be borne in mind that the "space underneath the first deck and aft of the after engine room bulkhead consisted of an athwartships watertight cofferdam from the after bulkhead of the engine room back to frame 66¾, approximately, and the after bulkhead of the cofferdam extended from the keel to the first deck" (C. G., R. Vol. 3, p. 1056). This watertight cofferdam, which was also considered gasoline tight by one of Insurers' experts (Lees, R. Vol. 3, p. 858), confined the gasoline spilled at Friday Harbor to a compartment entirely separate from the one in which the explosion actually took place.

Secondly, as stated in the N. F. P. A. booklet on fire protection standards for motor craft (Knisely, R. Vol. 2, p. 740):

> "Gasoline vapors are heavier than air and do not readily escape from low lying pockets such as bilges or tank bottoms."

The explosion was a high level one (C. G., R. Vol. 3, p. 1082). This is disputed by no one. Ammonia fumes, as opposed to gasoline, do not tend to collect, but, rather, are light and tend to dissipate (Sax, R. Vol. 2, p. 508).

Thirdly, even assuming that the gas fumes, if any, in the shaft alley recess, in some manner rose against the law of physics, in order to get into the engine room it would be necessary for them to pass through the watertight door on the centerline of the upper level engine room in the after watertight bulkhead between the engine room and the reefer flat. Was this door open during the night of September 16th/17th? After the explosion it was *found* open—but partly blown off and hanging on one hinge (C. G., R. Vol. 3, p. 1075). The weld around the door frame was ripped from the top center of the door around to the port side of the door and approximately half way down the length of the door. The door opened aft from starboard to port (C. G., R. Vol. 3, p. 1075). Granted, Jasprica testified that the door was "normally kept open", but, when asked if he specifically remembered whether or not the door was left open on the eve of the explosion he replied (R. Vol. 3, p. 1135):

> *"Not to my knowledge, I think* it was open." (Emphasis added.)

The burden of showing it to have been open is upon Insurers and this, we submit, they have not carried.

Fourthly, Mr. John M. Knisely, Insurers' explosion expert at the trial, was asked how much gasoline in liquid form would it have been necessary to have remained in the shaft alley, or anywhere else on the ship, in order that a sufficient detonating mixture would have resulted therefrom to have caused the degree of detonation which actually occurred. He replied (R. Vol. 2, p. 682):

> "The bare minimum figure would be in the neighborhood of two gallons."

The lower court, quantitatively speaking, refers only to gasoline that "must have soaked and impregnated large parts of the wooden area of the ship" (Op., R. Vol. 1, p. 241). Nowhere in the Record is there a scintilla of evidence that any *liquid* gasoline was sloshing around in the bilges of *Pacific Queen* eight days after the spill at Friday Harbor. Additionally, bilges are inherently very damp areas of the ship (Spaulding, R. Vol. 2, p. 842) and it would contravene the laws of physics for gasoline, which floats on water, to sink through this dampness and work its way into soaking wet wood.

A multitude of other factors excluding gasoline as an explosion candidate may be inferred from the facts but, in the interests of brevity, these will be reserved for oral argument. It is noteworthy that the Coast Guard investigator conceded that "the nature of the explosion reflects a point source to some extent inconsistent with an explosion of gasoline vapors permeating the entire engineroom space" (R. Vol. 3, p. 1082).

Neither Moulton (R. Vol. 2, p. 759) nor Lees (R. Vol. 3, p. 874), both experts who testified for Insurers at the trial, were willing to exclude ammonia as a possible explosion candidate. Not only have Insurers utterly failed to point to the source of ignition, as it was their burden to do, but they have also failed to prove with sound principles and logic that the fuel for the explosion was gasoline. Clearly, absent arson, ammonia is the only other available possibility. It is most likely that, in some manner, a fire occurred in *Pacific Queen's* engine room which heated the overhead ammonia lines until one of them burst with the resultant ejection of explosive ammonia vapors into the flaming engine room.

The legal effect of an ammonia explosion will be considered only briefly in latter sections of this brief. It will be seen that it, as would be a gasoline explosion, is a covered peril, especially in view of the fact that no unseaworthiness has been alleged by Insurers in connection with the handling or storage of ammonia on board *Pacific Queen*.

III

The Court erred in failing to conclude that negligence, even of the assureds themselves, will not preclude them from recovery.

As no negligence is claimed with respect to the handling of ammonia, this point accepts, for the purposes of argument, a gasoline explosion, but goes on to show that any negligence in connection with the handling of gasoline will not avail as a defense to the insurance contracts.

The British *Marine Insurance Act,* 1906, 6 Edw. 7, c. 41, set out at length in Appendix 1 of *Arnould on Marine Insurance,* 15th Ed., has codified the English marine insurance law and usage which has been deemed to govern these causes on appeal. Section 55(2)(a) of this act reads as follows:

> "The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew."

The modern law is that a peril of the sea is any fortuitous event, the happening of which results in "damage of a character to which a marine adventure is subject," and that the presence or absence of fault or negligence in the chain of causation is of no consequence. *The Stranna,* (1937) Probate 130. It cannot be denied that the opening of a valve on one of the *Pacific Queen's* gas tanks "in some manner" (Op., R. Vol. 1, p. 239) while the *Pacific Queen* was at Friday Harbor was a fortuitous event, negligently caused or otherwise. In fact, but for such an occurrence, the explosion would not have eventuated upon the facts as found by the court.

In *New York, New Haven and Hartford R. Co.* v. *Gray,* 240 F. 2d 460 (2d Cir. 1957), cert. den. 353 U. S. 966 (1957), the court, in speaking of a marine policy, stated at pages 464-465:

> "Negligence, whether or not 'gross,' but for which the accident would not have occurred, will not serve as a defense to such a policy. Only 'wilful misconduct,' measuring up to 'knavery' or 'design' will suffice; and neither the evidence nor the judge's findings of fact show such conduct. * * *
> And, as this is not a tort action, the horrendous niceties of the doctrine of so-called 'proximate cause,' employed in negligence suits, apply in a limited manner only to insurance policies."

See also: *Frederick Starr Contracting Co.* v. *Aetna Insurance Co.,* 285 F. 2d 106 (2d Cir. 1960). The court, in the *Gray* case quoted above, cited an English case, *Davidson* v. *Burnand,* L. R. 4 C. P. 117, which seems particularly relevant. In this case, which involved a sinking caused by the influx of water through a discharge pipe negligently left open, the court states:

> "The water got in, not by the happening of any ordinary occurrence in the ordinary course of the voyage, but by the accidental circumstances of some cock having been left open by the negligence of the crew. This is, in my opinion, sufficient to make the underwriter liable."

The loss of the *Pacific Queen* would not have occurred, under the facts as found by the trial court, but for the accidental circumstances of a cock having been inadvertently opened and Insurers must be held liable as they were in the *Davidson* case.

We note that the lower court's Findings of Fact, which were drafted in their entirety by counsel for Insurers, refer to "gross negligence and an extraordinary want of due

diligence" on the part of Mardesich, Pacific Queen Fisheries' managing partner, in connection with "hazardous loading, stowage, and subsequent spill of gasoline." "Gross negligence," then, is the strongest epithet leveled at any of the assureds anywhere in the opinions or findings. Such is not sufficient to avoid the insurance. As stated in *Arnould on Marine Insurance,* 15th Ed., § 786:

> "It may be inferred from the language of section 55(2)(a) of the Marine Insurance Act, 1906, although it is not expressly so provided therein, that, even where the peril occasioning the loss has been due to the negligence (not amounting to wilful misconduct) of the assured himself, the underwriter will not, on account of such negligence, be relieved from liability."

It was so decided before the passing of the Act in *Trinder and Co.* v. *Thames and Mersey Marine Insurance Co.,* (1898) 2 Q. B. 114 (C. A.).

Under both English and American law, then, it appears that the assureds may not be precluded from recovering by reason of any negligence that has been found by the court.

IV

The Court erred in failing to conclude that, in any event, the loss of the *Pacific Queen* resulted from perils covered by the "Inchmaree" Clause.

1. The Facts

The opinion of the lower court, in commenting on the Friday Harbor spill, states at page 241, Vol. 1 of the Record:

> "I am fully satisfied that as a result of that spill liquid gasoline and gasoline fumes permeated the lower after portions of that ship, and I am further satisfied that the measures taken to purge it were not adequate in the exercise of due diligence considering the serious nature of the spill."

And further, on page 245:

> "The owners did not use due diligence in that they provided improper and unsafe gasoline discharge facilities for the *Pacific Queen* and in their failure of adequate clean-up and precautions after the Friday Harbor spill."

For the purposes of this argument, we shall assume the correctness of the above views, although, in fact, we do not agree with them.

2. The "Inchmaree" Clause

The Clause reads as follows (R. Vol. 1, p. 82):

> "This insurance also specially to cover (subject to the free of average warranty) loss of or damage to hull or machinery directly caused by the following: * * *
>
> Explosions on shipboard or elsewhere * * *
>
> Negligence of Master, Mariners, Engineers or Pilots. provided such loss or damage has not resulted from want of due diligence by the Owners of the Vessel, or any of them, or by the Managers.
>
> Masters, Mates, Engineers, Pilot or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the Vessel."

The "Inchmaree" clause appears, with slight variations, in every form of Hull Clauses in present-day use, and its introduction into general use has greatly extended the liabilities of the underwriter. *Templeman on Marine Insurance,* page 316. Its genesis was commented on in *Saskatchewan Government Ins. Office* v. *Spot Pack,* 242 F. 2d 385 (5th Cir. 1957) at page 391 as follows:

> "Finally, the Underwriter, seeking to shore up its claim of a running, continuing obligation to use due

> diligence to keep the vessel seaworthy and unable to find words remotely suggesting 'due diligence' elsewhere in the policy, insists that the Inchmaree Clause expressly states it. But this is to read that Clause as a restriction of coverage and to ignore its rich history which reveals it and its several expansive amendments as the underwriters' response to the practical business needs of the shipping world in the face of adverse court decisions. As such, its purpose is to broaden, not restrict, to expand, not withdraw, coverage."

(A footnote to the above quotation refers to abundant historical sources.)

3. Negligence in purging the *Pacific Queen* of the effects of the spill is covered by the clause.

When the lower court states in its opinion (R. Vol. 1, p. 241) that "the measures taken to purge 'the *Queen*' were not adequate in the exercise of due diligence" it is, in effect, spelling out negligence. "Negligence," however, is explicitly covered by the clause "provided such loss has not resulted from want of due diligence by the Owners of the Vessel, or any of them, or by the Managers." Who, then, among the owners, participated in the purging of the vessel?

The lower court points out (R. Vol. 1, p. 240) that August Mardesich was on the *Pacific Queen* the day of the spill. True, but he arrived after the officers and crew had finished cleaning up and the vessel was back in operation discharging her cargo of fish (Jasprica, F. Vol. 4, pp. 1553, 1582). It must be determined, in the first instance, how extensive was his obligation to use due diligence to keep the vessel seaworthy under the circumstances surrounding the spill. The English law is that if it were shown that an owner had reason to believe that his ship was in fact unseaworthy, and *deliberately* refrained from an examination which would have turned his belief into knowledge, he might properly be held privy to the unseaworthiness

of his ship; the mere omission to take precautions against the possibility of the ship being unseaworthy cannot make the owner privy to any unseaworthiness which such precaution might have disclosed. *Cia Naviera Vascongada* v. *British & Foreign Marine Insurance Co., Ltd.,* (1936) Ll. L. Rep. 35, 58.

The evidence in this case does not show that Mardesich believed that gasoline had "soaked and impregnated large parts of the wooden area of the ship" (Op., R. Vol. 1, p. 241) and that he *deliberately* refrained from further examination. On the contrary, he was satisfied that the bailing, hosing and blowing efforts were sufficient to purge the *Pacific Queen,* and, under the applicable law, due diligence is thereby spelled out. It was solely the job of the *Pacific Queen's* "Master, Mariners and Engineers" to see to the *details* of purging the ship. As stated in the *Spot Pack* case, 242 F. 2d 385, 390 (5th Cir. 1957),

> "* * * if Courts succumb to the beguiling paternalistic plea that someway, somehow, the Owner ought to have checked to see if a duty was fulfilled, responsibility, thus divided, is undermined."

Jasprica is specifically excluded as an owner within the meaning of the "Inchmaree" Clause by the following language:

> "Masters, Mates, Engineers, Pilot or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the Vessel."

As stated in the *Spot Pack* case, cited supra, at page 392, it is unsound to "attempt to carve up the person of Master, or Engineer, or crew member into a metaphysical duality." The *Spot Pack* decision has been followed in its interpretation of the "Inchmaree" Clause in *Tropical Marine Prod.* v. *Birmingham Fire Ins. Co. of Pa.,* 247 F. 2d 116 (5th Cir. 1957), cert. den. 355 U. S. 903 (1957).

4. Explosion is covered by the clause.

"Explosions on shipboard or elsewhere" are specifically covered under the "Inchmaree" Clause. The Court has found (Op. R. Vol. 1, p. 243) that the destruction of the *Pacific Queen* was "the result of a gasoline explosion." What has been said above as to "due diligence" of the owners and the manager applies equally to the sub-section of the "Inchmaree" Clause specifying coverage for explosions, whether gasoline fueled, or ammonia fueled.

V

The Court erred in failing to conclude that the assureds were under no obligation to disclose any circumstances presumably known to Insurers or waived by them.

1. It must be conclusively presumed that Insurers knew the *Pacific Queen*'s methods of gasoline storage and handling.

Section 18 of the *Marine Insurance Act* reads, in part, as follows:

> "(3) In the absence of inquiry the following circumstances need not be disclosed, namely:
>
> (b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business as such, ought to know."

"The assured", said Lord Mansfield, "need not mention what the underwriter knows, what way soever he came by the knowledge; *or what he ought to know*; or takes upon himself the knowledge of; or waives being informed of; or what lessens the risk agreed and understood to run; or general topics of speculation; or every cause which may occasion natural perils, as the difficulty of the voyage, kind of seasons, proba-

bility of hurricanes, earthquakes, etc.; or every cause which may occasion political perils, from the rupture of states; from war, and the various operations of it, upon the probability of safety, from the continuance and return of peace, or from the imbecility of the enemy." *Carter* v. *Boehm,* (1766) 3 Burr. 1909; *Arnould on Marine Insurance,* 15th Ed. § 621. (Emphasis added.)

That the presumption referred to in the *Marine Insurance Act* is rooted deep in the mercantile past is indicated by the statement made by Lord Mansfield in *Noble* v. *Kennoway,* (1708) 2 Doug. 510, that:

> "Every underwriter is presumed to be acquainted with the practice of the trade he insures, and that whether it is established, or not. If he does not know it, he ought to inform himself."

See also: *Grant* v. *Lexington Ins. Co.,* 5 Ind. 23, 61 Am Dec. 74 (1854).

A lucid discussion of the above principle may be found in *Hazard* v. *New England Marine Ins. Co.,* 8 Pet. 557, 8 L. Ed. 1043, 33 U. S. 557 (1834). At page 1052 of 8 L. Ed. the Court quoted from a decision in 4 Mason 439 as follows:

> "Where a policy is underwritten upon a foreign vessel, belonging to a foreign country, the underwriter must be taken to have knowledge of the common usages of trade in such country as to the *equipments of vessels* of that class for the voyage on which she is destined. * * * Men who engage in this business are seldom ignorant of the risks they incur; and it is their interest to make themselves acquainted with the usages of the different ports of their own country and also those of foreign countries. This knowledge is essentially connected with their ordinary business and by acting on the presumption that they possess it, no violence or injustice is done to their interests." (8 L. Ed. 1052). (Emphasis added.)

Hence, where the insurer asks for no information and the insured makes no representations " * * * it must be presumed that the insurer has in person or by agent in such a case obtained all the information desired as to the premises insured, or ventures to take the risk without it, and that the insured, being asked nothing, has a right to presume that nothing on the risk is desired from him." *Clark* v. *Manufacturers Ins. Co.,* 8 How. 235, 12 L. Ed. 1061, 1066-1067.

The presumption involved is not rebuttable but conclusive, as is illustrated by the *Clark* case. It was there held that the underwriters, when not requiring representations from the insured, must "in point of law" be deemed to insure at their own peril (12 L. Ed. 1067).

Prior to issuance of insurance coverage for *Pacific Queen* for the season of 1955, Insurers required their usual condition survey of the vessel. The report, dated May 13, 1955, was prepared by a Mr. Marquat of the United States Salvage Association and ran some five typewritten pages (Lees, R. Vol. 2, p. 630). (The United States Salvage Association "is a service organization of marine surveyors for the express purpose of providing information to Underwriters concerning vessels, docks, piers, tugs, barges, anything of a marine nature" (Lees, R. Vol. 2, p. 635)). The survey form employed by Marquat stated, in bold print (Exh. 16):

"THIS REPORT IS EXCLUSIVELY FOR THE USE AND INFORMATION OF UNDERWRITERS".

On page 4 of the survey the following entries are found under "Fuel and Water Capacities":

"Fuel 49,000 gallons
Water 14,000 "
Gas 3,000 "

(Gasoline tanks under deck aft, proper filling lines and vents to atmosphere)."

On page 5 of the survey report, the last entry reads:

> "Ten 30-foot power seine skiffs are nested and lashed to the upper deck of this vessel."

The next year, 1956, *Pacific Queen* did not engage in Alaska operations, but remained in lay-up status (F. F., R. Vol. 1, p. 258). About May 2, 1957, Hansen & Rowland, Fisheries' insurance brokers, requested United States Salvage Association to make a condition survey of *Pacific Queen* (F. F., R. Vol. 1, p. 258). Insurers required such a survey as a condition precedent to the provision of insurance coverage (Duren, R. Vol. 4, p. 1444). The surveyor sent over by the Salvage Association was Mr. J. E. Elkins who had surveyed the vessel once before in 1949, at which time no gasoline was being carried by the vessel (F. F., R. Vol. 1, p. 258). Mr. Elkins, through past experience, was thoroughly acquainted with Bristol Bay gillnetter operations (Elkins, R. Vol. 3, pp. 1201, 1209, 1210, 1211) and admitted that he had seen gasoline storage on other reefer vessels in the Northwest (R. Vol. 3, p. 1217).

The deposition of Elkins, taken at the instance of plaintiffs, is set out in full in Volume 3 of the Record, pages 1171-1225, as he is considered to be one of the more important witnesses whom the trial judge did not have the opportunity to scrutinize. Owing to the fact that Elkins was a California resident, plaintiffs were unable to produce him at the trial (R. Vol. 4, p. 1603). Some of the most significant portions of his deposition testimony with respect to his survey of *Pacific Queen* are as follows (R. Vol. 3, pp. 1184, 1186, 1188, 1193, 1196):

> "Q. Now when you met Mr. Jasprica, [the Chief Engineer], did you recognize him? Did you know who he was? A. No.

Q. Did you talk to him? A. Not about the vessel, as I recall. I think we talked more about the previous fishing season, and—

Q. Well, did you ask him who he was? A. No, sir.

Q. Did you ask for help? A. No, sir.

Q. Did you ask him to accompany you? A. No, sir.

Q. Did you ask him where the chief engineer was? A. No, sir.

Q. Did you ask him where the master was? A. No, sir.

* * *

Q. Did you ask him to get any help for you that you wanted? A. No.

Q. Did you ask him to put any light on the ship? A. No.

* * *

Q. And you were supposed to have somebody with you? A. According to our rules, yes.

Q. Did you obey your rules? A. No.

* * *

Q. Were you ever denied access to any area of the vessel that you wished to look at? A. No.

* * *

Q. Did you ask to see where the gasoline was stored? A. No.

* * *

Q. And you were never refused any information on the vessel, were you? A. Not in this particular case."

Before leaving the ship, Elkins "looked over the piping" connected with the "auxiliary tanks aft" with his flashlight (Elkins, R. Vol. 3, p. 1206) and, apparently, "dropped by" *Pacific Queen* on a subsequent afternoon to see if they had filled up the CO_2 bottles (Elkins, R. Vol. 3, p. 1188).

Elkins survey report (Lees, R. Vol. 2, pp. 631-632) included the following remarks:

> "THIS REPORT IS EXCLUSIVELY FOR THE USE AND INFORMATION OF UNDERWRITERS".
>
> * * *
>
> This vessel acts as mother ship to 12 power gillnet boats.
>
> * * *
>
> Gillnet boats approximately 30′ x 8′ powered with 4-cylinder gasoline engine. Considerable damage around guards and open seams in hull. Owner has crew of men repairing gillnet boats and same will be in good operating condition before departure for Bristol Bay.
>
> * * *
>
> Vessel has been inspected while afloat at Tacoma, Washington and upon compliance with above recommendations, will be in satisfactory condition for operation."

Mr. Galbreath, a vice-president of Marine Office of America which was, and may still be, the marine manager for Glenns Falls Insurance Company, one of the Insurers, made several illuminating remarks at the trial. First, he acknowledged that it was "customary" for each Underwriter to pay a proportion of the survey fee for a survey of a vessel on which Underwriters "subsequently take a line" (R. Vol. 2, p. 777). Secondly, he admitted that (R. Vol. 2, p. 780):

> "We knew if she had—were using these tanks that had been mentioned in previous surveys for gasoline carrying—the purpose of putting the gasoline in those tanks was to fuel her own gillnet vessels."

Thirdly, he acknowledged that the committee of the Pacific Coast Hull Association, some members of which had had prior experience with *Pacific Queen,* was "satisfied with the vessel and gave it a rating" in May of 1957 (R. Vol. 2, p. 788).

Fourthly, he further acknowledged that Mr. Duren, of Hansen & Rowland, the assured's insurance brokers, who approached him with the object of placing the risk, "did not decline to answer any" of Mr. Galbreath's questions concerning the vessel; nor had Mr. Galbreath ever received a "false answer" from Mr. Duren (R. Vol. 2, pp. 789-790). Lastly, he stated that Marine Office of America had "complete confidence" in the surveys issued by the Salvage Association and its predecessor, the Board of Marine Underwriters (R. Vol. 2, p. 779).

Insurers must be presumed to know what their agents know, and, in the case of surveyor's, they must be presumed to know what their surveyors ought to learn through a reasonable degree of alertness and duly diligent inquiry. If the survey is negligently made, as Insurers now contend the Elkins survey was, it would be grossly unfair to impose the penalty for this negligence upon the assureds who had no reason to suspect that the surveyor would not properly perform his job.

2. Insurers waived disclosure of the *Pacific Queen*'s methods of gasoline storage and handling.

Section 18 of the *Marine Insurance Act* contains another exception which is applicable to this case. This section reads, in part:

> "* * * (3) In the absence of inquiry the following circumstances need not be disclosed, namely: * * *
>
> (c) Any circumstance as to which information is waived by the insurer."

The above sub-section was given extensive consideration in *Mann, MacNeal and Steeves* v. *Capital and Counties Insurance Co.,* (1921) 2 K. B. 300. This case involved a wooden, gas screw motor schooner which exploded and was totally

lost. Underwriters declined payment under the policies involved, pleading that the policies were voidable by reason of non-disclosure of an engagement to carry 2,500 drums of gasoline. The Court, in holding that the policies were valid because the underwriters had waived disclosure of the engagement by abstaining from inquiry, stated in part:

> "The engines of such a vessel are run with fuel oil and a considerable quantity of petrol is carried in tanks in the engine room for the purpose of heating the hot bulb of the engines, and for working the small petrol engines, which drive the winches. The quantity of petrol so carried by this vessel would probably be from 300 to 400 gallons. * * * I think that the plea of waiver can be supported on the ground indicated by Lord Esher, M. R. in *Asfar & Co.* v. *Blundell,* (1896) 1 Q. B. 123, 129, where in dealing with the question of concealment he says: 'But it is not necessary to disclose minutely every material fact; assuming that there is a material fact which he'—the assured—'is bound to disclose, the rule is satisfied if he discloses sufficient to call the attention of the underwriters in such a manner that they can see that if they require further information they ought to ask for it.' In my opinion the disclosure in the present case that this vessel was a wooden vessel with auxillary motor engines was a disclosure of the fact that it was proposed to carry cargo from the United States to France in a vessel specially and dangerously liable to fire damage, and that such disclosure was, within Lord Esher's language, a sufficient disclosure to put the underwriter on inquiry. Having regard to the language of the material section of the Marine Insurance Act, 1906, in which the law relating to concealment is now contained, the conclusion is rather that disclosure had been waived than that it had not been made; but the result is the same, so far as the appellants' case is concerned." (Per Bankes, L. J., pp. 306-309) * * *

"The learned Judge [below] has found that the freight engagement was a material circumstance, within the definition in sub-s. 2, for he thinks that it would have influenced the mind of a prudent insurer both in fixing the premium and in determining whether he would take the risk. I am not sure that I should have come to the same conclusion, in view of the fact that this small wooden cargo vessel possessed auxillary internal combustion engines and therefore had to carry in the engine-room a store both of crude oil and petrol, facts which were known to the insurers and would seem to indicate more peril than the cargo in question. * * * [The underwriter] is presumed to know matters of common knowledge and matters which an insurer in the ordinary course of his business as such ought to know. Amongst such matters would be, in the present case, that the vessel insured was a cargo vessel, that she would be carrying cargo from the United States of America to France, and that the cargo might consist of petrol in drums. If he objects to insuring such a cargo he can protect himself by making an inquiry or by insisting on a warranty against such cargo." (Per Atkin, L. J., pp. 310-312) * * *

"I do not conceive that the conclusions reached both by my Lord and Atkin L. J. on this question of waiver have the effect of weakening the governing statutory principle that a contract of Marine insurance is a contract based upon the utmost good faith. I do not doubt that the Courts must be at all times instant [insistent?] to see that this essential principle is never impinged upon. The views now expressed are, however, called for not only by the practice but by the necessities of marine insurance business as now conducted; they do little more than extend to voyage policies principles which must ex necessitate rei obtain in connection with time policies, and they are so

> far justified not only by the absence from the books of any decision to the contrary of them, but by the existence in America, if we may judge from the passage from Duer cited by Mr. Mackinnon, Vol. ii. Lect 13, s. 41, p. 446, of an absolute rule there to the same effect. Nor as it seems to me, is the principle adopted in these judgments, while necessary for the due conduct of business, injurious to any interest that requires protection even under these contracts uberrimae fidei. Every nervous or sceptical underwriter can always protect himself by a clause of warranty or by inquiry; and if there be on the part of the insuring broker, even in such a matter as we are here dealing with, any fraudulent concealment, the underwriter will of course be relieved unless the fraudulent broker discharges the very heavy burden of establishing affirmatively that the fraud which he perpetrated for the purpose of influencing the underwriter's judgment was in fact, in no way effective to lead him to accept the risk on the terms agreed." (Per Younger, L. J., pp. 317-318.)

The Marquat and Elkins surveys, fully discussed under sub-topic 1 above, without any doubt effected disclosure and imparted knowledge sufficient to call Insurers' attention to the fact that there was gasoline carried on board. If Insurers failed to have the gasoline storage facilities on board adequately inspected, they must be deemed to have waived any objections to the manner of storage and the supplying of detailed information concerning such storage.

Elkins' survey being favorable, the contract of insurance was complete. The assureds so understood, and, in reliance thereon, embarked upon their voyage. Insurers should be estopped, then, from asserting concealment as a defense. At the least, it is apparent that they have waived this defense by not causing a diligent and timely inspection to be made of the gasoline storage facilities on board *Pacific Queen*.

VI

The Court erred in failing to conclude that the insurance is not avoided because of unseaworthiness.

1. The Facts

The Court has found that the *Pacific Queen* was "rendered unseaworthy by changes in structure in carrying * * * gasoline during or before the year 1957 and by the gas spill at Friday Harbor, and plaintiffs' failure subsequent thereto to properly free the vessel of gasoline and gasoline fumes or to take proper precautions to prevent its recurrence" (Op., R. Vol. 1, p. 238). As pointed out under our Point V, either Insurers must be presumed to have known of any "unseaworthiness" existing prior to the Friday Harbor spill or it must be considered that they have waived the disclosure of information concerning it. The legal effect of the Friday Harbor spill, if any, will be taken up below.

2. There is no implied warranty of seaworthiness in this case.

Section 39(5) of the *Marine Insurance Act* states:

> "In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure * * *"

As plaintiffs are suing under time policies, the above wording knocks out any implied warranty of seaworthiness unless defendants can bring themselves within the special exception found in the latter part of the section which reads:

> "but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness."

3. The assureds did not send the *Pacific Queen* to sea after the Friday Harbor spill.

The *Pacific Queen* was never "sent to sea" after the Friday Harbor spill. All her maneuvers subsequent to the spill and up until the time of the explosion at Tacoma were in inland waters, more specifically, Puget Sound (R. Vol. 3, pp. 1167-1170). Section 82.1 of the U. S. Coast Guard "Pilot Rules for Inland Waters" states:

> "[T]he regulations in this part are prescribed to establish the lines dividing the high seas from rivers, harbors, and inland waters in accordance with the intent of the statute and to obtain its correct and uniform administration. The waters inshore of the lines described in this part are 'inland waters,' and upon them the Inland Rules and Pilot Rules made in pursuance thereof apply."

Section 82.120 of these regulations establishes the boundary line between the high seas and inland waters in the Juan de Fuca Strait and Puget Sound area as follows:

> "A line drawn from the northernmost point of Angeles Point to Hein Bank Lighted Bell Buoy; thence to Lime Kiln Light; thence to Kellett Bluff Light; thence to Turn Point Light on Stuart Island; thence to westernmost extremity of Skipjack Island; thence to Patos Island Light; thence to Point Roberts Light."

All of the *Pacific Queen's* movements subsequent to the Friday Harbor spill, as her log reflects, were well to the inshore side of the demarcation line specified in the Coast Guard regulations (R. Vol. 3, pp. 1167-1170).

It is submitted that the expression "sent to sea," as used in the *Marine Insurance Act,* was intended to mean something akin to "embarked on her adventure." It is at this time that Insurers have an interest to inquire into seaworthiness of the vessel to be insured before putting themselves at risk. Once the risk is accepted, with sufficient opportunity

to ascertain the facts having been afforded, the risk should remain attached, barring any personal misconduct of the owners or a loss resulting from their willful act or default.

The *Pacific Queen* was not commencing her adventure upon getting under way at Friday Harbor. Her adventure had been salmon fishing off the Alaskan coast, and that adventure had been terminated by the time of the Friday Harbor spill. Her last maneuvers were merely precedent to going into lay-up, as is well evidenced by the lay-up warranty extension under Endorsement Number 2 on the certificates (R. Vol. 1, p. 85).

In *New York N. H. and H. R. Co.* v. *Gray,* 240 F. 2d 460 (2nd Cir. 1957), cert. den. 353 U. S. 966 (1957), the Court rejected underwriters' defense that the ship had been put to sea in an unseaworthy state with the privity of the assured, pointing out, at page 466, that *"when the accident happened,* the carfloat had not been 'sent to sea' but was still moored" (emphasis added). The *Pacific Queen* was also tied up at the time of her accident and, therefore, underwriters' defense under Section 39 (5) of the *Marine Insurance Act* should be rejected in this case as it was in the *Gray* case.

The West Kebar, 4 F. Supp. 515 (D. C. N. Y. 1933), also supports plaintiffs' position. The pertinent language of the Court is as follows:

> "The movement of the West Kebar from one berth to another in the same harbor did not constitute the commencement of the voyage" (p. 519).

It is submitted that it is hardly one step further to say: The movement of the *Pacific Queen* from one berth to another in the same Sound did not constitute being "sent to sea."

4. Mere omission to take precautions against the ship being unseaworthy does not make the owner privy to any unseaworthiness which such precautions might have disclosed.

For the purpose of the following discussion, it will be assumed that the *Pacific Queen* was "sent to sea" after the Friday Harbor spill even though this is clearly not the fact.

The lower court states in its opinion (R. Vol. 1, p. 239):

> "The vessel was unseaworthy after the Friday Harbor spill for want of full and proper precautions to clean and purge the ship after that spill."

Insurers' defense of unseaworthiness fails, however, unless they can establish that the *Pacific Queen* was sent to sea after the Friday Harbor spill in an unseaworthy state *with the privity* of the assured. *Marine Insurance Act,* 1906, § 39 (5). What, then, is meant by the term "privity" and upon whom rests the burden of establishing such "privity"?

Cia. Naviera Vascongada v. *British & Foreign Marine Insurance Co., Ltd.,* (1936) 54 Ll. L. Rep. 35, involved the loss of a Spanish vessel, the *Gloria,* following heavy weather in the Irish Sea. Plaintiffs claimed for the loss under a time policy but defendants denied liability, contending that the vessel was scuttled, and alternatively, that she put to sea in an unseaworthy condition with the privity of the owners. The Court, in deciding for plaintiffs, stated at pages 51-58:

> "With regard to unseaworthiness, on the other hand, the onus is upon the defendants to show that the vessel was unseaworthy when she left Larne—which was her last port—and that the plaintiffs were privy to the fact that she was unseaworthy then (p. 51). * * * This brings me to the last point taken on behalf of the underwriters. I have held that the *Gloria* was unseaworthy when she left Larne. Were the plaintiffs privy to her so doing? To prove that they were the

> defendants must establish privity in someone in authority in the plaintiff company. * * * The Marine Insurance Act, 1906, contains no definition of the expression 'with the privity of the assured', which is used in Sect. 39 (5), the subsection upon which the defendants must rely. Nor has its exact meaning been argued or defined in any decided case. It is contended by Mr. Willink for the plaintiffs, that actual knowledge of the unseaworthiness to which the loss is attributable, must be proved. For this he relies upon the *dictum* of Lord Birkenhead in Mountain v. Whittle, (1921) 1 A. C. 615, at p. 618, and of Mr. Justice Roche, as he then was, in Frangos and Others v. Sun Insurance Office, 49 Ll. L. Rep. 354, at p. 357, and upon the definition of 'privy' in the Oxford Dictionary: 'participating in knowledge—accessory.' Mr. Willink also referred to Dudgeon v. Pembroke, 2 App. Cas. 284, at p. 297, but that was a case decided before the Act which I have to construe, and so I prefer to leave it out of consideration (pp. 57-58). * * * I think that if it were shown that an owner had reason to believe that his ship was in fact unseaworthy, and *deliberately* refrained from an examination which would have turned his belief into knowledge, he might properly be held privy to the unseaworthiness of his ship. *But the mere omission to take precautions against the possibility of the ship being unseaworthy cannot, I think, make the owner privy to any unseaworthiness which such precautions might have disclosed"* (p. 58). (Emphasis added.)

We have, then, a succinctly stated measure of the word "privity" as used in the *Marine Insurance Act.* It is not the role of this Court to disagree with it as English law and usage have been found to govern the contracting parties. It is, then, the role of the Court to apply the above standard of privity to the facts as it finds them. In doing so, we

submit that a finding that Mardesich and Jasprica *deliberately* refrained from an examination which might have revealed that gasoline "must have soaked and impregnated large parts of the wooden area of the ship" would be clearly erroneous (Op., R. Vol. 1, p. 241). Additionally, the omission to take precautions beyond washing down the affected areas and the employment of blowers and a bilge solvent cannot make the owners privy to any unseaworthiness which any additional precaution might have disclosed.

Before leaving this point, we would like to call special attention to number 24 of our Statement of Points in Volume 1 of the Record at page 297d. This point reads:

> "24. The Court erred in not applying much of the English law cited in the briefs after it had made the determination that English law and usage was to be controlling. In particular, the Court entirely overlooked a key English case, Cia. Naviera Vascongada v. British & Foreign Marine Insurance Co., Ltd. (1936) Ll. L. Rep. 35 and nowhere mentioned it by name or import in its opinions."

VII

The Court erred in failing to conclude that there was no violation of the Tanker Act.

Even if the Tanker Act, 46 U. S. C. § 391a, is applicable to fishing vessels, which the Coast Guard Commandant says it is not (R. Vol. 3, pp. 1092-1093), interpretation of the exception in the act, "fuel or stores", must be broad enough to fairly include the use of gasoline in gillnetters supplying fish to the *Pacific Queen* or the other reefer vessels associated with her in a Joint Venture (R. Vol. 3, pp. 1229-1234).

A narrow construction, however, reaching a contrary conclusion does not spell out such "a want of due care and diligence" (Op. R. Vol. 1, pp. 293-294) presumably as to make the vessel unseaworthy.

The District Court found:

(a) That the Tanker Act was applicable (Op., Vol. 1, p. 247).

(b) That gasoline was supplied to gillnet boats belonging to other freezers like herself under a Joint Venture Agreement and to two independent fishermen as well, and

(c) That the gasoline transported by the *Pacific Queen* to be used as described in (b) above was not "fuel or stores" but "cargo" transported in violation of the Tanker Act (F. F., Vol. 1, pp. 275-276).

On this general subject, the Court found that such violation of the Tanker Act constituted negligence or want of due care and diligence on the part of the vessel's owners but that this violation was not of such a character as to render the entire venture or voyage an illegal one. The Court found that the hauling of the gasoline in bulk for the use described above was not the primary purpose of the voyage but merely an incident thereof (Op., Vol. 1, pp. 293-294; C. L., Vol. 1, pp. 284-285).

How "a lack of due care and diligence," presumably to make a vessel seaworthy but not so stated, can be spelled out from a use of gasoline in gillnetters other than her own but associated with her, we do not know and submit that this is an altogether improper conclusion, even assuming the correctness of the basis on which it is made.

Appellants here do not dispute the applicability of the Tanker Act if, and only if, bulk gasoline is carried for use other than "fuel or stores." In a broad sense, and, we submit, a fair one, this was not the case.

There is nowhere a single finding in the record that any of the gasoline carried by the *Pacific Queen* was used for any purpose other than in furtherance of her fishing venture, whether such venture be considered joint with others or not. Pacific Queen Fisheries' and Pacific Reefer Fisheries' joint

venture agreement of May 10, 1957 (R. Vol. 3, pp. 1229-1234) was merely a practical and legitimate response to conservation restrictions imposed by the U. S. Fish and Wild Life Service (Mardesich, Vol. 3, pp. 986-987). This agreement merely constituted an effort by fishermen to stay in business and continue in their ancient trade by all proper means. It was well known, and there is no dispute in the record (Stephan, Vol. 3, p. 1257), that some of the owners of the *Pacific Queen* were likewise the owners of the other three vesesls of the same class, in the same trade with whom the *Pacific Queen* had her Joint Venture Agreements. There are a few independent Alaskan fishermen who own their own gillnet boats and during the season supply themselves with the only cash income available to them by fishing for various reefer vessels working those waters during the relatively short season. Two of them fished for the *Pacific Queen.* For this purpose they required to be supplied with gasoline fuel without which they could not operate. This sort of operation and accommodation is encouraged by all departments of the Government in order to assist Alaska in obtaining some sort of balanced economy.

Nowhere in the Record is there any suggestion that any of the gasoline carried by the *Pacific Queen* was used for any purpose other than that above referred to. We submit that in a larger, but nevertheless fair sense, all the gasoline she carried was used as "fuel or stores". Not a drop was ever used for any purpose other than operating gillnet boats that either directly or indirectly contributed to the fishing income of the *Pacific Queen* and those who manned her. No gasoline was ever sold or used ashore or afloat for other purposes. Had this been true, such gasoline would have indeed been "cargo" and rendered this vessel subject to Coast Guard inspection under the Tanker Act. When the District Court found, in its conclusion on the subject, that the carrying of gasoline in bulk was only an incident to the voyage and not its primary purpose, it came to the same conclusion, by inference, that we have expressed above.

In conclusion, we believe that the decision reached by the Commandant of the Government agency charged with the writing and enforcement of regulations under the Tanker Act should be given some weight. The Commandant of the Coast Guard, Vice Admiral A. C. Richmond, in his final disposition of this matter came to the following conclusion:

> "3. Since full compliance with either the regulations under the Tanker Act or the Dangerous Cargo Act, neither of which regulations were designed to cover this type of vessel and operation, which is presumably fishing, is impossible, or impracticable of accomplishment and further, since it is possible that the legal responsibilities of the owners of this type of vessel are not sufficiently clear, the file in this case will be referred to the Merchant Marine Council for study and action towards issuing such clarifying regulations as may be indicated" (R. Vol. 3, p. 1093).

Perhaps this final conclusion was a very practical one. The other reefer vessels, except one which was later lost by stranding, are all operating today, carrying gasoline in bulk for the operation of gillnetters in Alaskan waters, and all are insured by virtually the same underwriters in the same market that insured the *Pacific Queen.*

VIII

The Court erred in concluding that Hull, Peck and Royer were partners in Pacific Queen Fisheries.

The Certificate of Assumed Name (R. Vol. 1, pp. 15-17), duly filed on November 9, 1959 lists only the following as being partners:

> August P. Mardesich, Mike Barovic, Donald Barovic, John B. Breskovich, Nick Jasprica, J. J. Petrich, Joseph Mardesich, Nick Mardesich, Jr., John K. Villicich, Nick Ursich, Madeline Ursich, Louis Ursich.

The Certificate states that John B. Breskovitch had at some time entered into a separate agreement with Hull, Peck and Royer, pertaining to his interest in the partnership, whereunder they may have acquired "some interest" in the portion owned by Breskovitch.

Subsequently, by judicial fiat, Hull, Peck and Royer were deemed "additional plaintiffs" to these causes (R. Vol. 1, pp. 21, 51). The original plaintiffs do not dispute that, in order to maintain an action upon a partnership asset, the partners must be joined as parties to the action. *Seltzer* v. *Chadwick,* 26 Wash. 2d 297, 173 P. 2d 991 (1946). It is their contention, however, that the arrangement between Breskovitch and the three men did not constitute them partners.

United States v. *Coson,* 286 F. 2d 453 (9th Cir. 1961), a recent decision of this Appellate Court, seems to have decided the matter. It was therein stated, at page 462 that:

> "The transfer by a partner of his partnership interest does not make the assignee of such interest a partner in the firm. Hazen v. Warwick, 256 Mass. 302, 152 N. E. 342; Johnston v. Ellis, 49 Idaho 1, 285 P. 1015; Bynum v. Frisby, 73 Nev. 145, 311 P. 2d 972."

As we know of no damaging "admissions" made by any of these three men as referred to in the lower court's Findings of Fact X (R. Vol. 1, p. 286), we do not consider that this point warrants further discussion.

IX

The Court erred in concluding that the assureds' suit against Buffalo Insurance Company is time barred.

1. The Buffalo policy never became operative.

The one year contractual time bar provision contained in the Buffalo policy is set out in the lower court's Conclusions of Law at page 286, Vol. 1 of the Record, and the policy, or what more accurately should be termed a form, may be viewed at page 69. In its own words, the form states that "this policy shall not be valid unless countersigned by the duly authorized Agents of this Company." As may be readily seen, it was not countersigned and is, therefore, of no effect.

2. The terms of the insurance contract effected with Buffalo Insurance Company are embodied in the certificates of insurance issued by Hansen & Rowland, Inc.

The certificates involved state on their face in bold print (R. Vol. 1, p. 76):

> **"CERTIFICATE OF INSURANCE ISSUED BY HANSEN & ROWLAND, INC.**
>
> **Who have procured insurance as *hereinafter specified* from * * * Buffalo Insurance Company." (Emphasis added.)**

Attached to the face page of the certificates are the numerous terms, conditions and clauses which were intended to comprise the entire policy. The certificate represents that the insurance "procured" from Buffalo Insurance Company was as "specified" in the attached terms, conditions, and clauses. There is no intimation that a contractual limitation of action formed any part of the insurance procured. The meeting of the minds was limited, then, only to the terms contained in the certificates and the attachments thereto.

The meeting of minds was further delimited by the following verbiage found on the face of the certificates:

> "This insurance is made and accepted subject to all the provisions, conditions and warranties set forth in this face page and in the wordings, forms, and endorsements attached hereto, *all of which are to be considered as incorporated herein,* and any provisions or conditions appearing in the wordings, forms or endorsements *attached hereto* which alter the provisions and conditions appearing on this face page shall supercede such last mentioned provisions or conditions insofar as they are inconsistent therewith." (Emphasis added.)

The Buffalo form is skeletal in comparison with the coverage which had been effected under the certificates. It did not, for instance, contain the specific clauses—such as the American Hulls (Pacific) and the California Fishing Vessels endorsement—which framed the coverage which plaintiffs needed and sought and which comprised the only terms and conditions upon which there had been a meeting of the minds. Plaintiffs, herein, contemplated buying the comprehensive coverage afforded under the certificates, not the bare coverage of the Buffalo form which the defendant seeks to utilize as a trap for the unapprised and the unknowing.

In considering a similar one year contractual time bar provision, Viscount Dunedin, in *Phoenix Ins. Co. of Hartford* v. *De Monchy,* (1929) 45 T. L. R. 543, 35 Com. Cas. 67, 74 stated:

> "It follows, I think, that all clauses of the policy which are essential to the contract of marine insurance must be read into the certificate, but beyond that there is no necessity to go. The condition in question is a collateral stipulation imposing a condition precedent. It has nothing particular to do with insurance, but might be applied to any contract. Common sense and fairness revolt against the idea of this being enforced against the holder or indorsee of the certificate."

A contractual time bar forms no part of the terms of the only contracts that were consensually consummated—the certificates and their attachments. The policy provision providing for such a bar being in derogation of the general statute of limitation, the Court should give plaintiffs every favorable inference in deciding this point.

X

The Court erred in denying assureds' motion for jury trial.

When *Pacific Queen Fisheries* v. *Symes* and the English underwriters was removed from the State to the Federal Court by the consent of both counsel and both judges, a demand for a trial by jury had already been made, perfected and the jury fee paid in accordance with the Rules of Practice of the Superior Court of the State of Washington (R. Vol. 1, p. 53). Under F. R. C. P. 81(c) the party who has made a timely demand in State Court retains it in the District Court.

When this case was removed and subsequently consolidated (R. Vol. 1, p. 223) with *Pacific Queen Fisheries* v. *Atlas* and other American companies, then pending in the District Court, plaintiffs still retained their right to a trial by jury in the consolidated cause and it did not lie within the discretion of the District Court to take from them a Constitutional right which they had already perfected and never waived.

Pacific Queen Fisheries v. *Symes* and the other English underwriters was commenced on September 29, 1958, removed to the District Court and remanded to Superior Court where a Second Amended Complaint was filed on November 10, 1959 (R. Vol. 1, pp. 3-9). This case was later No. 2348 in the District Court. To this Complaint defendants demurred and the demurrer was overruled (R. Vol. 1, p. 20) by the Judge of the Superior Court, Pierce County, on May 9, 1960. Plaintiffs moved to strike much of defendants subsequent answer on June 12, 1960, which motion was filed June 17, 1960 (R. Vol. 1, pp. 38-46).

Defendants state (R. Vol. 1, p. 51) that on July 22, 1960, they were served by plaintiffs with a demand for a jury trial. The appearance Docket shows that the Jury Fee was paid on August 8, 1960 (R. Vol. 1, p. 53). This completed the formalities required of a plaintiff for right to a trial by jury under the Rules of Procedure of the Superior Court of the State of Washington. The motion to strike was still pending when the cause was removed to the District Court by stipulation on October 28, 1960 (R. Vol. 1, pp. 46-48).

Pacific Queen Fisheries v. *Atlas* and other American companies, No. 2543, was commenced in the Superior Court of the State of Washington on May 13, 1960, and removed on May 17, 1960 (R. Vol. 1, pp. 55-60). The motion to remand was denied on July 1, 1960 (R. Vol. 1, pp. 128-129).

On September 26, 1960, it was stipulated and agreed to between counsel in the District Court that the Superior Court action, *Pacific Queen Fisheries* v. *Symes,* be removed to the District Court and consolidated with *Pacific Queen Fisheries* v. *Atlas* for the purpose of trial (R. Vol. 1, p. 223), and approved by the Superior Court on October 28, 1960, (R. Vol. 1, p. 46). At this time (R. Vol. 1, p. 223), the District Court had under advisement plaintiffs' motion for a jury trial and so stated in the same order that approved the removal of the *Symes* case to the District Court and consolidated it with the *Atlas* case for the purpose of trial. This motion was denied on September 28 and the memorandum decision was filed on September 30, 1960 (R. Vol. 1, pp. 224-226).

The right to a trial by jury in a removed action is discussed in *Moore's Federal Practice,* Vol. 5, page 319, where it is pointed out that Rule 81(c) must be considered in connection therewith. That rule reads as follows:

> "(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. *Repleading is not necessary unless the court so orders.* In a removed action in which the defend-

> ant has not answered, he shall answer or present the other defenses or objections available to him under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. *If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it,* if his demand therefore is served within 10 days after the petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition." (Emphasis added.)

As the plaintiffs had already perfected their right to a jury trial in the removed cause and, in addition, thereafter argued in the consolidated cause a previously pending motion for a jury trial, the District Court had no power under Rule 81(c) to deprive plaintiffs of their right to trial by jury in the consolidated cause which they already had in the removed cause.

There was no prejudice to the defendants and none was shown or alleged with respect to either action or the consolidated action. They neither did anything they would not otherwise have done nor refrained from doing anything they should have done.

CONCLUSION

The law of insurance can not be considered, as is the law of torts, an instrument of coercion upon assureds to improve operating practices. It is against the unpredictable happenstance of loss, through whatever set of circumstances set in motion by the laws of cause and effect, that men take out

insurance. If it were the law that marine policies afford no protection against losses having their genesis in causes traceable to men's delicts, these policies would afford but scant protection against maritime disasters.

Plaintiffs purchased coverage in good faith upon which they were entitled to rely and upon which they did rely. Certainly they did not go into the insurance market to buy themselves an overseer. It would be a miscarriage of justice to permit defendants to avoid the policies by means of the inapplicable defenses and strained technicalities which they have raised.

Judgment should be reversed and entered for plaintiffs, together with interest, their costs and disbursements, and attorneys fees.

Dated: New York, New York,
March 8, 1962.

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Nos. 17460-17461

IN THE

United States Court of Appeals

For the Ninth Circuit

PACIFIC QUEEN FISHERIES, *et al.*,

Appellants,

vs.

L. SYMES, *et al.*,

Appellees.

PACIFIC QUEEN FISHERIES, *et al.*,

Appellants,

vs.

ATLAS ASSURANCE COMPANY, *et al.*,

Appellees.

APPELLANTS' REPLY BRIEF

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REPLY BRIEF FOR APPELLANTS, PACIFIC QUEEN FISHERIES, *et. al.*

Introductory Statement

Insurers' "Answering Brief" fails to reply to Fisheries' contentions on a point by point basis. In spite of Insurers' jumbled approach to Fisheries' presentation, our reply brief will maintain the original order established in our main brief in the belief that, if our position is to be made clear to the Court, our arguments and logic should not be fragmented.

Reply Argument

I

The Court erred in failing to conclude that Insurers had the burden of showing the source of ignition which they admit they failed to show.

Insurers attempt to by-pass *Hart-Bartlett-Sturtevant Co.* v. *Aetna Ins. Co.,* 293 S. W. 2d 913 (Sup. Ct. Utah 1956) (Insurers had burden of proving in what particular way the explosion was caused) and *Hartford Fire Ins. Co.* v. *Empire Coal Min. Co.,* 30 F. 2d 794 (8th Cir. 1929), quoted in Fisheries' main brief at page 13, by invoking the *Pennsylvania Rule,* a procedural rule predicated on statutory fault (Ins. Br., p. 67). For the purposes of argument only, we shall assume that Fisheries were guilty of a statutory fault.

Insurers' bald statement (Ins. Br., p. 67) that the roots of the *Pennsylvania Rule* "are imbedded in English marine insurance law" is absolutely incorrect. The "leading case" they cite for this proposition, *The Fenham,* (1870) L. R. 3 P. C. 212, 6 Moo. P. C. (N. S.) 501, 23 L. T. 329, was not even an insurance case, but, rather, involved a suit for damage resulting from a collision of a steamship and a brig. The words left out at the second set of asterisks in Insurers' quote are as follows:

> "* * *: that if it is proved that any vessel has not shown lights * * *"

None of several leading English texts on marine insurance consulted mentions this so-called "leading case." This marine tort rule is foreign to English insurance law, repugnant to it, is not mentioned in any English marine insurance case nor in the *Marine Insurance Act,* 1906, 6 Edw. 7, C. 41.

Insurers' then proceed to cite a large number of American collision and limitation of liability cases purporting to

illustrate application of the rule. On page 68 of their brief, they list five so-called "insurance cases" in which they say the rule has been invoked. Of these five cases, *The Denali,* 112 F. 2d 953 (9th Cir. 1940), and *The Princess Sophia,* 61 F. 2d 339 (9th Cir. 1932), are actually admiralty proceedings for the limitation of liability. *The Material Service* is listed twice for the proposition, firstly as the case in the district court and, secondly, as the case on appeal *sub nom. Leathem-Smith-Putnam Nav. Co.* v. *National U. F. Ins. Co.,* 96 F. 2d 923 (7th Cir. 1938). It should be noted that the latter case retreated from the stiff language of the District Court in that the court used the words *"did not* contribute" rather than the key *Pennsylvania Rule* language: "* * * *could not* have" contributed. The *Pennsylvania,* 19 Wall. (86 U. S.) 125, 136 (1873). (Emphasis added.)

The remaining decision cited on Insurers' list of "insurance cases" is *Richelieu and Ontario Nav. Co.* v. *Boston Marine Ins. Co.,* 136 U. S. 408 (1890), a case involving a stranding held to be causally related to violation of a Canadian Navigation Statute quoted by the Court as follows (p. 422):

> "Section seven of the Canadian Statute provides that 'in case any damage to person or property arises from the non-observance by any vessel or raft of any of the rules prescribed by this Act, such damage shall be *deemed* to have been occasioned by the *willful default* of the person in charge of such raft or of the deck of such vessel at the time, unless the contrary be proved, or it be shown to the satisfaction of the court that the circumstances of the case rendered a departure from the said rules necessary; and the owner of the vessel or raft, *in all civil proceedings,* and the master or person in charge as aforesaid, or the owner, if it appears that he was in fault, in all proceedings, civil or criminal, shall be subject to the legal consequences of such default." (Emphasis added.)

The court, in applying the *Pennsylvania Rule,* stated (pp. 422-423) :

> "In this case, *in view of* the seventh section of the Canadian Statute, and the fact that perils occasioned by the want of ordinary care and skill or of seaworthiness were excepted by the policy, the same rule is applicable; hence, the burden was on the plaintiff to show that neither the speed of the steamer nor the defect of the compass could have caused, or contributed to cause, the stranding. * * *" (Emphasis added.)

The application of the rule was clearly limited to the specified circumstances and no American marine insurance case since this 1890 decision has applied the strict language of the doctrine except for *The Material Service,* cited *supra,* which was modified on appeal.

In any event, it would be unfair to impose a harsh American doctrine emanating from marine tort law on assureds who have contracted for law and usage which rejects the doctrine in the field of marine insurance.

The law governing burden of proof in explosion cases, as enunciated on page 13 of Fisheries' main brief, stands unrebutted. No English cases having been found to the contrary and there being no reason to believe that the principles stated are in any way repugnant to English law and usage (Main Br., p. 12), the principles must be accepted as governing. Insurers have not even attempted to carry the burden of showing in what particular way the explosive mixture, whatever it may have consisted of, in the *Pacific Queen* was ignited.

II

The Court's finding that the destruction of the vessel was the result of a gasoline explosion is clearly erroneous.

Insurers, instead of endeavoring to persuade this Court that *Pacific Queen's* explosion was fueled by gasoline, have merely adopted the Findings of Fact of the District Court on this and all factual questions in the case. (Ins. Br., p. 4). Apparently they are under the mistaken impression that Fed. R. Civ. P. No. 52(a) will pull the laboring oar for them (Ins. Br., III (D), p. 25).

Fed. R. Civ. P. No. 52(a), which is concerned with findings of fact made by the district court after trial, states, in part:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In applying Rule 52, however, the appellate court must distinguish "between primary inferences drawn from demeanor testimony, which the trial court is best capable of making, and secondary inferences drawn from primary inferences, which theoretically the appellate court is equally able to draw." *Moore's Federal Practice,* Vol. 5, § 52.03 (1), p. 2615. Appellate courts may make their "own inferences from undisputed facts or purely documentary evidence." *Pacific Portland Cement Co.* v. *Food Mach. & Chem. Corp.,* 178 F. 2d 541, 548 (9th Cir. 1949). In this Circuit it is considered a "duty" to draw such inferences. *Gillette's Estate* v. *Commissioner of Internal Rev.,* 182 F. 2d 1010, 1013-1014 (9th Cir. 1950). See also: *Ashworth* v. *General Accident Fire and Life Assurance Corporation,* (1955) I. R. 268, 285.

The lower court found that the destruction of *Pacific Queen* resulted from "a gasoline explosion according to the

overwhelming preponderance of the evidence * * *" (Op., R. Vol. 1, p. 243). This finding of fact, which was more in the nature of a conclusion of fact, was based upon the following inference (Op., R. Vol. 1, pp. 242-243):

> "It is very clear, however, that there was something about the natural air circulation, and by that I mean unaided circulation, in this ship that for some reason or other brought gasoline fumes from the after reefer deck and below that area to the upper portions of the ship" [on the morning of the Friday Harbor spill]. "It is certainly a reasonable probability that exactly the same thing happened on the night of September 17."

To get into the engine room, however, it would be necessary for these fumes to pass through the watertight door on the centerline of the upper level engine room in the after watertight bulkhead between the engine room and the reefer flat. As pointed out in Fisheries' main brief at page 22, the Coast Guard found:

> "(s) The watertight door on the centerline of the upper level of the engineroom in the after water-tight bulkhead, between the engineroom and the reefer flat, was found open, partially blown off, and hanging on one hinge; the weld around the door frame was ripped from the top center of the door around to the port side of the door and approximately half way down the length of the door. The door opens aft from starboard to port" (C. G., R., Vol. 3, p. 1075).

"Report Number 2211" of Ace Diving Service (Pls. Exh. 34-1, admitted R., Vol. 1, p. 351) describes the damage to the watertight door at page 5 as follows:

> "G. M. C. diesel engine auxilliary located directly aft the forward watertight door, reefer flat, shows flame damage upper regions, also damaged by being struck

> by the door described above when it was *blown open,* this door noted as now hanging by its lower hinge, frame badly buckled." (Emphasis added.)

The initially closed condition of this key watertight door severs the theory of Insurers' expert, Mr. Knisely, which theory was adopted by the lower court (Op., R., Vol. 2, pp. 242-243, 246), that gasoline vapors were wafted up from the shaft alley recess into the forward upper part of the engine room. Mr. Knisely was asked to assume that "the doorway between the reefer flat and the upper engine room was open * * *" (R., Vol. 3, p. 683), which was, in the light of uncontroverted facts, an incorrect assumption.

It is extraordinary that Insurers have not commented in any way in their brief on the matter of this key bulkhead door which is discussed at page 22 of Fisheries' main brief. It is also to be noted that the lower court made no primary finding as to whether this door was open or closed at the time of the explosion.

III

The Court erred in failing to conclude that negligence, even of the assureds themselves, will not preclude them from recovery.

Insurers have made no effort to meet this point, other than to cite (Ins. Br., p. 59) Section 55(2) of the *Marine Insurance Act* which Fisheries had previously set out in full (Main Br., p. 24). Inferentially, it seems, they argue that this section is not applicable because the loss of *Pacific Queen* was not, they say, "proximately caused by a peril insured against."

An inspection of the policy terms (R., Vol. 1, p. 74, 82) shows coverage for "fire," perils "of the seas," and, under the Inchmaree Clause, "Explosions" and "Negligence." Cer-

tainly it cannot be argued that the loss of *Pacific Queen* was not proximately caused by one or more of these perils.

Arnould on Marine Insurance, 15th Ed., states at page 764:

> "It is clear that a loss may be proximately caused by more than one peril, that is by a combination of causes, and in this event the loss can be properly attributed to any one of such causes."

This has been said to be so, for example, when the shot of a man-of-war precipitates "overwhelming by the sea." *Leyland* v. *Norwich Union,* (1918) A. C. 350, 353.

No "wilful misconduct" having been alleged by Insurers or found by the Court, Fisheries may recover for loss of *Pacific Queen* in spite of any negligence connected with the loss.

I V

The Court erred in failing to conclude that, in any event, the loss of the *Pacific Queen* resulted from perils covered by the "Inchmaree" Clause.

Insurers' brief, at page 59, states that "want of due diligence by the owners or managers bars recovery under the Inchmaree Clause." What is "due diligence"? According to *Black's Law Dictionary,* 4th Ed., it is:

> "Such a measure of prudence, activity or assiduity, as is properly to be expected from and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case."

In other words, one who is duly diligent is one who pursues an object or an end without being negligent along the

way. Negligence of owners, however, is a peril covered under the "Adventures and Perils" clause of the policies (R., Vol. 1, p. 82; Main Br. pp. 24-26). The "due diligence" requirement under the Inchmaree Clause does nothing, then, to cut back the coverage of the policy as an entity.

In any event, what standard or measure of prudence, as a matter of law, should be fixed upon the concept of "due diligence" under the particular circumstances of our case. If the various provisions of the *Marine Insurance Act* are to hang together properly, this standard must be the same as that enunciated in *Cia Naviera Vascongada* v. *British & Foreign Marine Insurance Co., Ltd.,* (1936) Ll. L. Rep. 35, 58 as the measure of "privity" (Main Br., p. 44). As no *deliberate* shunning of unseaworthiness—which was not even realized, if it existed, by the owners—has been shown, the "due diligence" clause, as a matter of law, fails to provide Insurers with a defense. As the vessel had an estimated fair market value of $660,000.00 (R., Vol. 3, p. 1035), one would not expect the owners, or any of them, to "deliberately" ignore any known unseaworthiness. The lower court did not find that any of the owners did so nor has this even been alleged by Insurers.

V

The Court erred in failing to conclude that the assureds were under no obligation to disclose any circumstances presumably known to Insurers or waived by them.

Insurers (Ins. Br. p. 38) and the lower court (Op., R., Vol. 1, p. 237) have advanced the argument that there was nothing "observable" by Elkins, who held *Pacific Queen*'s 1957 survey, which would have apprised him of *Pacific Queen's* increased gasoline capacity or of the altered discharge facilities. Elkins, however, testified that he "looked over the piping" connected with the "auxilliary tanks aft"

(R., Vol. 3, p. 1206). The two forward converted diesel tanks had been relieved of their diesel line connections at the top and the fittings on the tank sides had been plugged (Buckler, R., Vol. 4, pp. 1383-1384). The significance of this must have been apparent—or at least should have been so—to Elkins who was thoroughly acquainted with Bristol Bay gillnet operations (Elkins, R., Vol. 3, pp. 1201, 1209, 1210, 1211) and who admitted that he had seen gasoline storage on other reefer vessels in the Northwest (R., Vol. 3, p. 217). In any event, Insurers knew *Pacific Queen* was carrying gasoline (Galbreath, R., Vol. 2, p. 780). The quantity carried was immaterial from a risk standpoint as Insurers' expert, Mr. Knisely, stated that two gallons of gas was all that was needed to fuel an explosion of the magnitude of that which destroyed the *Pacific Queen.*

The cases cited (Ins. Br., p. 45) by Insurers involving *classification society* surveys are not relevant. The Court's attention is also invited to the quotation from the *Leathem* case on page 43 of their brief which is one of the more gross examples of distortion of the meaning of a case, through use of omissions, substitutions and inversions, contained in Insurers' brief.

Further reply on the issue of concealment will be presented at oral argument.

VI

The Court erred in failing to conclude that the insurance is not avoided because of unseaworthiness.

Although the parties to this appeal cannot be said to have agreed to be bound by the law and usage of the Republic of Ireland, there is much learned discussion and correlation of English cases decided under the *Marine Insurance Act* in *Ashworth* v. *General Accident Fire and Life*

Assurance Corporation, (1955) I. R. 268, cited and quoted by Insurers at pages 53-54 of their brief. Black, *J.,* in a dissenting opinion, had the following to say, for instance, on the meaning of "privity" under Section 39(5) of the Act (p. 300):

> "But what does 'privity' mean? I am satisfied it means actual knowledge. Having the means of knowledge might often justify an inference of actual knowledge, but save in such a case, having the means of knowledge will not in my view, suffice. That was the position at common law. Failing to use the means of knowledge might only be negligence on the part of the shipowner, and *Trinder, Anderson & Co.* v. *Thames and Mersey Marine Insurance Co.,* (1898) 2 Q. B. 114, is a clear decision that negligence, unless wilful, causing a loss by perils of the seas will not prevent the insured from recovering on his policy, even though the negligence was his own. There must be what in *Thompson* v. *Hopper,* E. B. & E. 1038, at p. 1047, Willes, J. called *dolus malus.*"

If the owners "failed to use the means of knowledge" to ascertain whether or not gasoline had impregnated the wooden members of the shaft alley recess after *Pacific Queen's* Friday Harbor spill, this would only amount to negligence, a covered peril. *Dolus malus,* where one intentionally misleads another through deception and fraud, is entirely absent from this case, not having been either alleged by Insurers or found by the lower court.

VII

The Court erred in failing to conclude that there was no violation of the Tanker Act; the Court was correct, however, in concluding that the violation it found did not render the entire adventure or voyage an illegal one.

Assuming, for the purposes of argument only, that Fisheries did violate the *Tanker Act,* 46 U. S. C. § 391a, what effect should be given to such violation with respect to the insurance covering *Pacific Queen* and her gillnetters? This question was answered, in part, by the lower court as follows (Op., R., Vol. 1, p. 293-294):

> "In the circumstances of this particular case, I find and hold that the violation of the Tanker Act in the particular circumstances now under consideration constituted negligence or a want of due care and diligence for the security of the Pacific Queen on the part of its owners, but that this *violation of positive law was of such a character and extent as not to render the entire adventure or voyage an illegal one.* The hauling of gasoline in bulk in violation of the Act was not a primary purpose of the voyage but merely an incident thereof, and in such circumstances I do not find that the entire adventure or voyage itself is to be deemed illegal * * *" (Emphasis added.)

The "negligence or a want of due care and diligence" mentioned by the lower court are, as Fisheries have already pointed out (Main Br. pp. 24-29), covered perils. Insurers now attack, however, the italicized portion of the lower court's conclusion by invoking (Ins. Br. p. 64) Section 41 of the *Marine Insurance Act* which reads as follows:

> "41. There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner."

Illegality, assuming there was such, "* * * was remote and distinct from the contract or only collateral and concomitant with it, or incidental, or merely precedent or subsequent, and not constituting a part of it or embracing and imbuing its stipulations." *Cunard* v. *Hyde,* (1858) E. B. & E. 670, 120 Eng. Rep. 661. (Second case (1859), 29 L. J. Q. B. 6, decided differently on ground of privity). As stated in *Arnould on Marine Insurance,* 15th Ed. at § 750, page 705, "a voyage may be legal, because justified by its object, though technically contravening the strict terms of some Order in Council."

Even if we are to assume that the *Tanker Act* was materially violated, Fisheries, not having intended such violation, may not be precluded from recovery under the policies. The test suggested in *Waugh* v. *Morris,* L. R. 8 Q. B. 202, 42 L. J. Q. B. 57, 28 L. T. 265, 21 W. R. 438, 1 Asp. M. C. 573, a case cited in *Chalmers Marine Insurance Act 1906*, 4th Ed., at page 58, is: Did the contracts contemplate "the very object of satisfying an illegal purpose," or were they entered into "for the express purpose of a violation of the law"? This has never been alleged by Insurers nor has it been found by the lower court (Op., R. Vol. 1, p. 245). Further authorities on the question of intent are: *Regazzoni* v. *Sethia,* (1958) A. C. 301, discussed in *Arnould on Marine Insurance,* 15th Ed. §§ 738-741. See also *Washington State Insurance Code,* R. C. W. § 48.19.090, for non-marine (Mem. Dec., R. Vol. 1, pp. 224-226) rule on intent.

The lower court's conclusion, in any event, that Fisheries had "imputed knowledge of the provisions of the Tanker Act and of applicable Coast Guard regulations" (Op., R. Vol. 1, p. 293) is in error. On August 25, 1958, the Commandant of the United States Coast Guard held that neither the *Tanker Act,* 46 U. S. C. § 391a, nor the *Dangerous Cargo Act,* 46 U. S. C. § 170 *et seq.,* "were designed to cover [The *Pacific Queen's*] type of vessel and operation which is presumably fishing * * *." (R. Vol. 3, p. 1093; Main Br. p. 48).

Prior to the loss of *Pacific Queen,* her owners were of this view and still are of this view. It would be a distortion of justice if the owners were to be deemed apprised of violation on their part of statutes which the governmental agency charged with their administration considered inapplicable to Fisheries' venture.

Insurers refer, on page 63 of their brief, to the citation by the Coast Guard of another vessel, the *Alaska Reefer,* for having violated the *Tanker Act,* and imply that this citation occurred in August of 1957. Actually, *Alaska Reefer,* was not cited until September 5, 1957 (Binns R. Vol. 4, p. 1283) and a decision and order on the matter was not handed down until October 30, 1957 (Binns, R. Vol. 4, p. 1285) which was approximately six weeks *after Pacific Queen's* explosion. Any so called "imputed knowledge" of alleged applicability of the *Tanker Act* could not have come into being, then, until after the explosion occurred.

VIII

The Court erred in concluding that Hull, Peck and Royer were partners in Pacific Queen Fisheries and that damaging admissions were made by them.

Counsel for Insurers have failed to point out a single damaging admission made by Hull, Peck or Royer, whether they be adjudged partners or something less than partners.

The extent to which counsel for Insurers went to "brainwash" a former Engineer, Peck, is interesting (R. Vol. 3, pp. 967-974). He was visited twice at his home, the second visit lasting three hours. His deposition was noticed and taken immediately thereafter and he was asked "had he not heard" or certain practices aboard the *Pacific Queen* some years after he left. Over objection of counsel to Fisheries, he admitted he had. Subpoenaed at the trial, he admitted that the only person he had heard these things from was counsel for Insurers! We had thought that such practices by insurance companies had gone out with the silk hat.

IX

The Court erred in concluding that assureds' suit against Buffalo Insurance Company is time barred.

Insurers have cited no English authority on the point and, therefore, *Phoenix Ins. Co. of Hartford* v. *De Monchy,* (1929) 45 T. L. R. 543, 35 Com. Cas. 67, quoted at page 51 of Fisheries' main brief, must be deemed conclusive and the Buffalo time bar provision must be disregarded.

X

The Court erred in denying assureds' motion for jury trial.

With respect to Fisheries' claim of error in denying its motion for a jury trial, Insurers make a number of assertions which are not borne out by the facts or the Record, which assertions are enumerated hereunder.

1. That Fisheries did not have a right to a jury trial in *P. Q. F.* v. *Symes* (2348), at the time it was removed to the District Court and consolidated for trial with *P. Q. F.* v. *Atlas* (2343), September 28, 1960.

In support of this position and before our opening brief, Insurers caused to be inserted in the printed Record certain material which was not in the Record and not in existence at the time of Judgment, without leave of the court or notice to their adversaries. This material appears on pages 51-53 of the Record and consists of an affidavit of counsel dated months after the judgment and a photostat of the Appearance Docket in State Court of *P. Q. F.* v. *Symes* (2348).

Fisheries were puzzled upon finding this material in the printed Record when it was received from the Clerk of

the Court in San Francisco. Its purpose and intent were not clear until Insurers' brief was subsequently received. Therein Insurers, for the first time, made the assertion that no demand for a jury trial had been made or filed in the State Court case. It is true that the Appearance Docket does not record the filing of the demand itself but it does record the payment of the jury fee of $12.00 on August 8, 1960, which, we submit, is probably the best evidence. It is significant, we think, that the date of August 8, 1960 is the same date that a jury was demanded in *P. Q. F.* v. *Atlas* (2343), which was already pending in the District Court. Thereafter the State Court case came on for setting before Judge Johnson on September 12, 1960, at which time Mr. Copeland and Mr. Stephan both appeared before the Court and the case was set down for a four day jury trial. The minutes of that hearing, not heretofore transcribed, and affidavit of the Judge, a photostat of his docket and the original receipt for Jury Fee of the Clerk of the Superior Court of Pierce County are submitted herewith as an additional part of the Record.

In summary on the point, counsel for Insurers had positive knowledge of Fisheries right to a jury trial in the State Court case (2348) and the approximate date of trial of that case at the time he consented to the removal of that case to the District Court for consolidation for trial with *P. Q. F.* v. *Atlas* (2343), after which the motion for a jury trial was *again* argued before the District Court.

2. That Fisheries' counsel may be properly held to an exact knowledge of and strict obedience to all the Federal Rules of Civil Procedure—and in particular, Rule 38—but that this does not apply to the District Judge with respect to Rule 81(c).

As we have heretofore detailed, a motion for a jury trial was made, argued and denied in *P. Q. F.* v. *Atlas* (2343),

wherein it was pointed out that Mr. Copeland had had no experience in Federal Court on the civil side, followed his State Court procedure and demanded a jury trial with the filing of a Reply, (wherein he denied the affirmative matter set up in Insurers' answer), all pursuant to the practice in this state. Insurers' counsel had not been prejudiced in the slightest by this short delay and none has even been alleged.

Immediately after the joinder of the two causes for trial, counsel for Fisheries reargued its demand for a jury trial and both orally and in his brief pointed out the applicability of *Beacon Theaters* v. *Westover,* 359 U. S. 500, 3 L. Ed. 2d 988, 79 S. Ct. 948 (1959), which came up on appeal from the Ninth Circuit. Whether on the question of discretion or the joinder of jury and non-jury actions for trial, we deemed this case to be controlling and strongly urged it upon the District Court. It was not mentioned in the decision denying our motion (R. Vol. 1, p. 224) and there is no evidence that it ever received the consideration we believe it deserved.

This is entirely apart from Fisheries' rights under Federal Rule 81(c) which the District Court completely ignored. It is manifestly unfair, we submit, to hold opposing lawyers to two different standards of knowledge of and conduct under the Federal Rules or for the Court to hold either lawyer to a higher standard of knowledge than the Court itself possesses.

XI

Appellants have substantially complied with the rules of this Court.

Insurers' zealous quest for an inflexible application of the Rules of this Court seems disproportionate to the gravity of the substantive issues involved in this appeal. The spurious nature of their objections will be outlined hereunder.

1. Fisheries' designation of record does not violate Rule 17(b).

This Court recently commented on the requirements of record designations in *Springer* v. *Best,* 264 F. 2d 24 (9th Cir. 1959). Footnote 2, found at pages 27-28, reads, in part, as follows:

> "In general the problem of what must be part of the record on appeal is governed by Rule 75(a) of the Fed. R. Civ. P., 28 U. S. C., which provides that 'the appellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record.* * *'
>
> "Because of the language of this rule, 'problems as to what portions of the record, proceedings and evidence must be designated as matters to be included in the record are not uncommon. These problems must necessarily be solved in the light of the circumstances of the particular case in which they arise, keeping in mind that Rule 75 (e) requires the omission of inessential matters but that the record on appeal must include all matters which are essential to a determination of the questions raised on appeal' " (Citations omitted).

Owing to errors inherent in the lower court's opinion, findings and conclusions, Fisheries, with an eye to economy, kept its designation of portions of the trial transcript to be printed down to about 300 pages. Not only, however, were all of the voluminous exhibits designated to be contained "in the original" in the record on appeal, but the key deposition of surveyor Elkins (R. Vol. 3, pp. 1171-1225) was specified for printing along with parts of the trial transcript.

In any event, Insurers' counsel, under the section of this Court's Rule 17 (b) which permits a counter-designation of "* * * additional parts of the record which he thinks material," filled in the record where he felt it prudent to do so. His designation included the "entire Transcript of Proceedings in the above entitled actions".

Even if Fisheries' designation was inadequate, which we deny, "irregularity" in the designation of the record by an appellant is not a proper ground for dismissal of an appeal when the "irregularity" has been cured by the appellee. *Grand Lodge, Etc.* v. *Eureka Lodge No. 5, Etc.,* 114 F. 2d 46 (4th Cir. 1940).

2. Fisheries' main brief substantially complies with this Court's Rule 18(2)(d).

In order to apprise appellees fully of contentions Fisheries intended to urge on appeal, Fisheries' counsel set out Appellants' "Points" (R. Vol. 1, pp. 297a-297h) in great detail. This was done to preclude surprise and to facilitate Insurers' counter-designation of record. Under Appellees' interpretation of the rules of this Court, however, Appellants would be penalized for an endeavor to present a complex case coherently and succinctly on brief. It is doubted that these rules are intended to deprive counsel on brief of all discretion with respect to format or to prohibit them from tailoring their brief in such a way that the pivotal of multifarious issues are highlighted and presented with clarity.

Rather than becloud the key issues of fact and law with a long listing of errors, some of which are relatively collateral, Appellants have emphasized the ultimate errors in their brief by numbering and stating them in bold print in the subject index and again as headings to each point of argument. Objections by appellees in similar circumstances have been overruled by this Court. *Simons* v. *Davidson Brick Co.,* 106 F. 2d 518 (9th Cir. 1939); *Monaghan* v. *Hill,* 140 F. 2d 31 (9th Cir. 1944).

Thys Company v. *Anglo California National Bank,* 219 F. 2d 131 (9th Cir. 1955), cert. den. 349 U. S. 946 (1955), reh. den. 350 U. S. 855 (1955), cited by Insurers at pages 32 and 33 of their brief, was a patent infringement case in which this Court castigated appellants—and we think rightly so—for submitting briefs which were in "almost complete disregard" of the rules of Court (p. 132).

In *Everest & Jennings, Inc.* v. *E. & J. Manufacturing Co.,* 263 F. 2d 254 (9th Cir. 1958), cert. den. 360 U. S. 902 (1959), cited at page 33 of Insurers' brief, the Court did not consider errors specified in the record which were not also set out and argued in the brief. Appellants herein feel that the Court need go no further than to consider the ultimate errors numbered, set out and argued in their brief.

In *Peck* v. *Shell Oil Co.,* 142 F. 2d 141 (9th Cir. 1944), cited by Insurers' brief at page 34, only those points with respect to which "no argument or discussion" was presented in appellants' opening brief were deemed abandoned and were not considered by this Court (p. 143).

As a convenience to the Court, Appendix I of this reply brief sets out our Statement of Points (Specification of Errors) with cross-references to the lower court's opinions, findings, conclusions and to Fisheries' main brief.

3. Appellants' non-compliance with this Court's Rule 18(2)(f) was a non-prejudicial technical failure which has been cured.

Leading counsel for Fisheries obtained two sample Ninth Circuit briefs which were used, in part, as format guides for Fisheries' main brief. Neither of these briefs contained a table of exhibits. We supposed no such table was required where no evidentiary questions were involved. In any event, the irregularity, if it is to be considered such, has been cured in Insurers' brief and could have been cured in this reply brief.

Brandow v. *United States,* 268 F. 2d 559 (9th Cir. 1959), cited by Insurers' brief at page 34, turned on an evidentiary question—whether or not a recording had been properly admitted as an exhibit. We have no evidentiary questions in the *Pacific Queen* case. Furthermore, noncompliance with Local Rule 18 (2) (f) was not the ground upon which the lower court's decision was affirmed.

Medak's police statement (Exh. No. 4 to trial Exh. No. 391) was, Insurers' contention notwithstanding (Ins. Br., p. 34), admitted into evidence (R. Vol. 2, p. 610). When a second copy of it was offered, this second copy was rejected (Transcript, p. 1508).

Morrison v. *Texas Company,* 289 F. 2d 382 (7th Cir. 1961), cited at page 34 of Insurers' brief, has no relevance to their contentions other than to affirm that "appeals should be decided, if at all possible, on the merits" (p. 385), a general proposition with which we fully agree. See also: *Palmer* v. *Miller,* 145 F. 2d 926 (8th Cir., 1944) (technical failure without prejudice).

Conclusion

Although no one can say with certainty what blew up the *Pacific Queen,* we know that its explosion is not traceable, under any interpretation of the evidence, to the Friday Harbor spill. Even if it were, the assureds were guilty of no wilful misconduct and must be paid their insurance proceeds which have been withheld by Insurers with no valid cause.

Judgment should be reversed and entered for Appellants together with interest, their costs and disbursements, and attorneys' fees.

Dated: April 24, 1962
New York, New York

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APPENDIX

Appendix I

Statement of Points (Specification of Errors) and Cross-References

The following listed points on appeal may also be found at pages 297a-297h of Volume 1 of the Record. With indicated exceptions, they have been incorporated by reference under "Specification of Errors" at page 11 of Appellants' main brief.

1. (This error is no longer considered germane to this appeal).

2. The Court erred in denying plaintiffs' motion for jury trial on September 28, 1960.

(a) Memorandum Decision, R. Vol. 1, p. 224

(b) Finding of Fact No. III, R. Vol. 1, p. 251

(c) Appellants' Main Brief, pp. 52-55

3. (This contention has not been pressed on appeal).

4. The Court erred in finding that the increased gasoline capacity of the Pacific Queen was not made at a time or under circumstances such as to bring the increase to the actual or constructive notice of the Underwriters.

(a) Opinion, R. Vol. 1, p. 237

(b) Finding of Fact No. X(B), R. Vol. 1, p. 261

(c) Appellants' Main Brief, pp. 4-5-30-39

5. The Court's finding that there was an increase in the risk by reason of the increase in the gasoline capacity is clearly erroneous.

(a) Opinion, R. Vol. 1, p. 235

(b) Finding of Fact No. IX(C), R. Vol. 1, p. 260

(c) Appellants' Main Brief, pp. 30-39 (Increase in risk assumed for purposes of argument only)

6. The Court's finding that neither Marquat nor Elkins was put on notice of the increased gasoline capacity or of the facilities for discharging gasoline at the time of their respective surveys is clearly erroneous.

(a) Opinion, R. Vol. 1, p. 237

(b) Findings of Fact Nos. X(D) and (E), R. Vol. 1, p. 262

(c) Appellants' Main Brief, pp. 4-5, 30-39

7. The Court's finding that Pacific Queen was unseaworthy when she left for Alaska in 1957 is clearly erroneous.

(a) Opinion, R. Vol. 1, pp. 238-239

(b) Finding of Fact XI(A), R. Vol. 1, pp. 264-265

(c) Appellants' Main Brief, pp. 30-39, 40 (Unseaworthiness assumed for purposes of argument only)

8.. The Court's finding that Pacific Queen was unseaworthy after the Friday Harbor spill had been dealt with by shipboard personnel is clearly erroneous.

(a) Opinion, R. Vol. 1, pp. 238-239

(b) Findings of Fact Nos. XI(E), (F) and (G), R. Vol. 1, pp. 267-268

(c) Appellants' Main Brief, pp. 7, 40-45 (Unseaworthiness assumed for purposes of argument only)

9. The Court's finding that duly diligent measures were not taken to purge the spilled gasoline after the Friday Harbor spill is clearly erroneous.

(a) Opinion, R. Vol. 1, p. 241

(b) Finding of Fact No. XI(C), R. Vol. 1, pp. 265-266

(c) Appellants' Main Brief, p. 7 (Inadequacy of purging efforts assumed for the purposes of argument only, pp. 26-27)

10. The Court's finding that it is a "reasonable probability" that unaided air circulation brought gasoline fumes from the after reefer deck and below that area to the upper portions of the ship at the time of the explosion is clearly erroneous.

(a) Opinion, R. Vol. 1, pp. 242-243

(b) Finding of Fact XII(H), R. Vol. 1, pp. 271-272

(c) Appellants' Main Brief, pp. 21-23

11. The Court's finding that the destruction of the vessel was the result of a gasoline explosion is clearly erroneous.

(a) Opinion, R. Vol. 1, p. 244

(b) Finding of Fact No. VI, R. Vol. 1, p. 253; Finding of Fact No. XII, R. Vol. 1, pp. 268-272

(c) Appellants' Main Brief, pp. 17-23

12. The Court's finding that there was no fire in Pacific Queen preceeding the explosion is clearly erroneous.

(a) Opinion, R. Vol. 1, p. 243

(b) Finding of Fact No. XII(C), R. Vol. 1, p. 269

(c) Appellants' Main Brief, pp. 19-20, 23

13. The Court erred in finding that the plaintiffs did not use due diligence to prevent the loss of Pacific Queen by explosion.

(a) Opinion, R. Vol. 1, pp. 244-245

(b) Finding of Fact No. XIII, R. Vol. 1, pp. 272-274

(c) Appellants' Main Brief, pp. 26-30

14. (This contention has not been pressed on appeal).

15. The Court erred in concluding that the policies were void, ab initio because of owners' concealment.

(a) Opinion, R. Vol. 1, p. 292

(b) Conclusion of Law No. IV, R. Vol. 1, p. 280-281

(c) Appellants' Main Brief, pp. 30-39

16. The Court erred in concluding that plaintiffs violated a statutory warranty of seaworthiness.

(a) Opinion, R. Vol. 1, pp. 292-293

(b) Conclusion of Law No. V, R. Vol. 1, pp. 281-282

(c) Appellants' Main Brief, pp. 40-45

17. The Court erred in concluding that the loss of Pacific Queen did not occur from and was not due to an agreed peril stated in the Inchmaree clause.

(a) Opinion, R. Vol. 1, p. 293

(b) Conclusion of Law No. VI, R. Vol. 1, pp. 282-283

(c) Appellants' Main Brief, pp. 26-30

18 The Court erred in concluding that the Tanker Act is applicable.

(a) Opinion, R. Vol. 1, p. 293

(b) Conclusion of Law No. VII, R. Vol. 1, pp. 283-284

(c) Appellants' Main Brief, p. 45 (Assumed for the purposes of argument only).

19. The Court erred in concluding that the plaintiffs had imputed knowledge of the provisions of the Tanker Act.

(a) Opinion, R. Vol. 1, p. 293

(b) Conclusion of Law No. VIII, R. Vol. 1, p. 284

(c) Appellants' Main Brief, pp. 45-49 (Not briefed as no violation of Tanker Act is admitted; briefed in Reply Brief).

20. The Court erred in concluding that Hull, Peck and Royer were Partners in Pacific Queen Fisheries at the time of the loss, are necessary parties plaintiff to this action, and that they made damaging admissions binding plaintiff, Pacific Queen Fisheries.

(a) Opinion, R. Vol. 1, p. 294

(b) Conclusion of Law No. X, R. Vol. 1, pp. 285-286

(c) Appellants' Main Brief, pp. 48-49

21. The Court erred in concluding that the liability of defendant Buffalo Insurance Company is in any event barred by the time of suit clause.

(a) Opinion, R. Vol. 1, p. 294

(b) Conclusion of Law No. XI, R. Vol. 1, pp. 286-287

(c) Appellants' Main Brief, pp. 50-52

22. The Court erred in concluding that Pacific Queen was repeatedly sent to sea in an unseaworthy state with the privity of the owners.

(a) Finding of Fact No. XI, R. Vol. 1, pp. 264-268

(b) Appellants' Main Brief, pp. 41-42

23. The Court erred in concluding that a gasoline explosion by accidental source was reasonably foreseeable by the owners of Pacific Queen.

(a) Finding of Fact No. XVIII, R. Vol. 1, pp. 277-278

(b) Appellants' Main Brief, pp. 21-23

24. The Court erred in not applying much of the English law cited in the briefs after it had made the determination that English law and usage was to be controlling. In particular, the Court entirely overlooked a key English case, Cia Naviera Vascondaga v. British & Foreign Marine Insurance Co., Ltd., (1936) Ll. L. Rep. 35, and nowhere mentioned it by name or import in its opinions.

(a) Appellants' Main Brief, p. 45

25. The Court erred in failing to conclude that it must be conclusively presumed that Underwriters' knew Pacific Queen's method of gasoline storage and handling.

(a) Appellants' Main Brief, p. 30 (Point was fully briefed for trial judge).

26. The Court erred in failing to conclude that Underwriters waived disclosure of Pacific Queen's methods of gasoline storage and handling.

(a) Appellants' Main Brief, p. 36 (Point was fully briefed for trial judge)

27. The Court erred in failing to conclude that plaintiffs were under no obligation to disclose any circumstances presumably known to Underwriters or waived by them.

(a) Appellants' Main Brief, p. 30 (Point was fully briefed for trial judge)

28. The Court erred in failing to conclude that there is no implied warranty of seaworthiness in this case.

(a) Appellants' Main Brief, p. 40 (Point was fully briefed for trial judge)

29. The Court erred in failing to conclude that the assureds did not send Pacific Queen to sea after the Friday Harbor gasoline spill.

(a) Appellants' Main Brief, p. 41 (Point was fully briefed for trial judge)

30. The Court erred in failing to conclude that the mere omission to take precautions against the ship being unseaworthy does not make the owners privy to any unseaworthiness which such precautions might have disclosed.

(a) Appellants' Main Brief, p. 43 (Point was fully briefed for trial judge)

31. The Court erred in failing to conclude that to be held privy to any unseaworthness which such precautions might have disclosed, it is the English rule that it must be found that Mardesich deliberately refrained from an examination which might have revealed that the gasoline which spilled at Friday Harbor soaked and impregnated parts of the wooden area of the ship.

(a) Appellants' Main Brief, pp. 44-45 (Point was fully briefed for trial judge)

32. The Court erred in failing to conclude that the insurance is not avoided because of unseaworthniess.

(a) Appellants' Main Brief, p. 40 (Point was fully briefed for trial judge)

33. The Court erred in failing to conclude that any negligence in purging Pacific Queen of the effects of the Friday

Harbor gasoline spill is covered by the "Inchmaree" clause. clause.

(a) Appellants' Main Brief, p. 28 (Point was fully briefed for trial judge)

34. The Court erred in failing to conclude that Pacific Queen's explosion is covered by the "Inchmaree" clause.

(a) Appellants' Main Brief, p. 30 (Point was fully briefed for trial judge)

35. The Court erred in failing to conclude that the loss of Pacific Queen resulted from perils covered by the "Inchmaree" clause.

(a) Appellants' Main Brief, p. 26 (Point was fully briefed for trial judge)

36. The Court erred in failing to conclude that even if the "Inchmaree" clause was not incorporated in the policies, negligence is still a covered peril.

(a) Appellants' Main Brief, p. 24 (Point was fully briefed for trial judge)

37. The Court erred in failing to conclude that under general perils of the seas coverage, the rule is that negligence, whether or not gross, but for which the accident would not have occurred, will not serve as a defense for Underwriters; and that only wilful misconduct, measuring up to knavery or design will suffice as a defense.

(a) Appellants' Main Brief, p. 25 (Point was fully briefed for trial judge)

38. The Court erred in failing to conclude that defendants have the burden of showing the source of ignition and of precluding the possibility of any outside unforeseeable intervening act of a third person as an igniting agent.

(a) Appellants' Main Brief, pp. 13-17 (Point was fully briefed for trial judge)

39. The Court erred in failing to conclude that fishing vessels are exempt from the terms of the Tanker Act.

(a) Appellants' Main Brief, p. 48 (Point was fully briefed for trial judge)

40. The Court erred in failing to conclude that there was no violation of the Tanker Act by the owners of Pacific Queen.

(a) Appellants' Main Brief, p. 45 (Point was fully briefed for trial judge)

41 The Court erred in failing to conclude that Hull, Peck and Royer were not partners in Pacific Queen Fisheries at the time of the loss, are not necessary parties to this action and that they made no damaging admissions.

(a) Appellants' Main Brief, pp. 48-49 (Point was briefed for trial judge)

42. The Court erred in failing to conclude that the Buffalo policy never became operative.

(a) Appellants' Main Brief, p. 50 (Point was fully briefed for trial judge)

43. The Court erred in failing to conclude that the terms of the insurance contract effected with Buffalo Insurance Company are embodied in the certificates of insurance issued by Hansen & Rowland, Inc.

(a) Appellants' Main Brief, p. 50 (Point was fully briefed for trial judge)

44. The Court erred in failing to conclude that plaintiffs' suit against Buffalo Insurance Company is not time barred.

(a) Appellants' Main Brief, pp. 50-52 (Point was fully briefed for trial judge)

45. The Court erred in failing to conclude that valid certificates of insurance were issued by defendants to plaintiffs and were in full force and effect at the time of the loss.

(a) Appellants' Main Brief, pp. 2, 5, 6, 50, 55 (Point was briefed for trial judge)

46. The Court erred in failing to conclude that plaintiffs have fulfilled all the terms and conditions of the contracts of insurance on their part to be performed.

(a) Appellants' Main Brief, pp. 2, 5, 6, 30-36, 55 (Point was briefed for trial judge)

47. (As no law has been found on this point, it is not pressed on appeal).

48. The Court erred in failing to conclude that the entire loss, as proved and agreed as to amount, should be paid by Underwriters to plaintiffs, together with interest from the date of loss and the costs of this action.

(a) Appellants' Main Brief, pp. 2, 55 (This is the point of the actions)

Nos. 17460-17461

IN THE

United States Court of Appeals

For the Ninth Circuit

PACIFIC QUEEN FISHERIES, *et al.*,

Appellants,

vs.

L. SYMES, *et al.*,

Appellees.

PACIFIC QUEEN FISHERIES, *et al.*,

Appellants,

vs.

ATLAS ASSURANCE COMPANY, *et al.*,

Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DISTRICT

PETITION OF APPELLANTS FOR REHEARING

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IN THE

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DISTRICT

PETITION OF APPELLANTS FOR REHEARING

To the Honorable Circuit Judges WALTER L. POPE, STANLEY N. BARNES and FREDERICK G. HAMLEY:

Comes now, PACIFIC QUEEN FISHERIES, *et al.*, the appellants in the above-entitled causes, and presents this, their petition for a rehearing of the above-entitled causes, and, in support thereof, respectfully show:

This petition seeks this Court's reconsideration of its opinion herein filed on August 3, 1962. Appellants' grounds will be stated hereunder in a format approximately following that of the opinion. Newly cited cases will be indicated by an asterisk.

I

The Facts

A. The Court has overlooked or misconceived material facts as follows:

1. The Court has overlooked (Op. p. 3, lines 19-22) the material *admitted* facts that the surveyors were employed by Insurers (R. 778), the survey fees were paid by Insurers (R. 777), that Insurers required the surveys (R. 790) before passing upon a request for insurance and that the 1955 and 1957 surveys were marked: "THIS REPORT IS EXCLUSIVELY FOR THE USE AND INFORMATION OF UNDERWRITERS." (Exh. 16; Exh. 17).

2. The Court has overlooked (Op. p. 4, lines 16-29), the material fact that Elkins' survey certified the seaworthiness of *Pacific Queen* in the following language: "Vessel has been inspected while afloat at Tacoma, Washington and upon compliance with above recommendations, in the opinion of the undersigned will be in satisfactory condition for operation" (Exh. 17).

II

Did Appellants conceal circumstances material to the risk?

A. The Court has overlooked or failed to apply (Op. p. 13, lines 20-22) a principle directly controlling, i.e. Lord Mansfield's statement that the assured need not mention what the underwriter *"takes upon himself the knowledge of"*—Insurers doing this through requiring a survey.

Bates v. *Hewitt,** (1867) L. R. 2 Q. B. 595, 608 ("cardinal rules"), 609 ("never been qualified or questioned"); *Greenhill* v. *Federal Insurance Co.,** (1927) 1 K. B. 65, 86 ("classical passage"); *Eldridge on Marine Policies,** 3rd Ed. (1938) pp. 20-21 ("leading case on this subject"); *Frangos and Others* v. *Sun Insurance Office, Ltd.,* (1934) 49 Ll. L. Rep. 354, 358 (owners could rely on survey by competent

person); *Compania de Navegacion* v. *Firemen's Fund Ins. Co.,** 277 U. S. 66 (1928); case below—19 F. 2d 493, 495 ("survey * * * waived the implied warranty of seaworthiness"); *Freimuth* v. *Glens Falls Ins. Co.,** 50 Wash. 2d 621, 626, 314 P. 2d 468 (1957) (assured justified in relying upon surveyor's approval of trip); *Roth* v. *City Ins. Co.,** 20 Fed. Cas. 1255, 1259-1260 (1855); *Peter Paul, Inc.* v. *Rederi A/B Pulp,** 258 F. 2d 901, 906 (2nd Cir. 1958).

B. The Court has misconceived a material fact and proposition of law (Op. pp. 14-15) in that:

1. It did not recognize that Insurers *knew* gas in bulk was to be carried *below deck,* regardless of the content of the Elkins' survey. See: Marquat survey (Main Br. p. 32); Galbreath admissions (R. 780, 783-786).

2. Such knowledge was sufficient notice to Insurers of the nature of the risk involved. *Mann, MacNeal and Steeves* v. *Capital and Counties Insurance Co.,* (1921) 2 K. B. 300, 306 (petrol carried in *tanks* in engine room sufficient notice); approved in *Kreglinger and Fernau, Ltd.* v. *Irish National Insurance Co., Ltd.** (1956) Ir. R. 116 (underwriter put on inquiry as to details); *New York Life Ins. Co.* v. *Strudel,** 243 F. 2d 90, 93 (5th Cir. 1957) (cursory investigation no excuse); *Columbia Nat. Life Ins. Co. of Boston Mass.* v. *Rodgers,** 116 F. 2d 705, 707 (10th Cir. 1940), cert. den. 313 U. S. 561.

III

Was the *Pacific Queen*, with the privity of Appellants, sent to sea in an unseaworthy condition?

A. The Court failed to apply the doctrine of waiver to alleged unseaworthiness existing prior to the Friday Harbor spill (Op. pp. 19-21).

B. The Court applied incorrect principles of construction which lead it to an incorrect determination of the marine insurance meaning of "privity".

*Eldridge on Marine Policies,** 3rd Ed., (1938), p. 51; *British and Foreign Marine Insurance Co., Ltd.* v. *Samuel*

*Sanday & Co.,** (1916) 1 A. C. 650, 673 (existing law can only be altered by codifying Act by indisputable language); *British and Foreign Marine Insurance Co., Ltd.* v. *Gaunt,** (1921) 2 A. C. 41, 48; *Pac. Coast Coal Freighters Ltd.* v. *Westchester Fire Ins. Co.,** (1926) 4 D. L. R. 963 (Marine Insurance Act "privity" section "a codification of the law as it stood at the time"), aff'd (1927) 2 D. L. R. 590 (C. A.); *Mountain* v. *Whittle,* (1921) 1 A. C. 615, 618-619, 626 (must show awareness of unseaworthiness); *Thomas* v. *Tyne and Wear Steamship Freight Insurance Association,** (1917) 1 K. B. 938, 940-941 (misconduct necessary); followed in *Cohen* v. *Standard Mar. Ins. Co.,** (1925) 30 Com. Cas. 139, 159; *Frangos and Others* v. *Sun Insurance Office, Ltd.,* (1934) 49 Ll. L. Rep. 354, 357 (knowledge necessary).

IV

Did the loss and damage to the *Pacific Queen* result from want of due diligence by Appellants?

A. The Court has overlooked or misconceived a material question in the case in that:

1. It did not give any legal effect to the findings and conclusions of the Coast Guard, adopted by the lower court, that "inrushing sea water" (R. 1082) contributed to the loss of *Pacific Queen* which "sank at the dock in approximately 30 feet of water" (R. 1051). *Leyland Shipping Company* v. *Norwich Union Fire Insurance Society,* (1918) A. C. 350, 363 (need not determine dominant cause unless there is an excepted cause), affirming (1917) 1 K. B. 873,* 883-884 (assured covered under "perils of the sea" when incursion of water caused by shell or torpedo,) 887 ("the fact that the loss is partly caused by things not distinctly perils of the sea, does not prevent its coming within the contract"), 888 (covered when combination of causes includes one covered cause), 895 (same); *Board of Trade* v. *Hain S. S. Co.,** (1929) A. C. 534, 539; *Dudgeon* v. *Pembroke,* (1877) 2 App.

Cas. 284, 297; followed in *Frangos and Others* v. *Sun Insurance Office, Ltd.,* (1934) 49 Ll. L. Rep. 354, 359; *Reischer* v. *Borwick,** (1894) 2 K. B. 548, 551; *Ashworth* v. *General Accident Fire and Life Assurance Corporation,* (1955) Ir. R. 268, 300 (dissent on other grounds).

2. It did not conclude that, in any event, by reason of there having necessarily been some form of "ignition" prior to the explosion, there was coverage under the enumerated "Fire" coverage. See: *Commercial Standard Insurance Company* v. *Feaster,** 259 F. 2d 210 (10th Cir. 1958).

3. It did not conclude that, in any event, there was coverage under the section of the insurance reading "* * * and of all other like Perils", etc. (Main Br. p. 17). *West India Telegraph Company* v. *Home and Colonial Insurance Company,** (1880) 6 Q. B. Div. 51; *Thames and Mersey Marine Insurance Company* v. *Hamilton Fraser & Co.,** (1887) 12 App. Cas. 484, 495 ("operative words"), 500 ("fire" may be extended to similar risks by the general words); *Southport Fisheries* v. *Saskatchewan Gov. Ins. Office,** 161 F. Supp. 81 (D. C. N. C. 1958); *Feinberg* v. *Insurance Company of North America,** 260 F. 2d 523 (1st Cir. 1958).

4. It did not take up, therefore, such controlling cases as *New York, N. H. & H. R. Co.* v. *Gray,* 240 F. 2d 460 (2nd Cir. 1957) (assured recovers even if culpably and grossly negligent), cert. den. 353 U. S. 966, and *Frederick Starr Contracting Co.* v. *Aetna Insurance Co.,* 285 F. 2d 106, 109 (2nd Cir. 1960) ("due diligence" requirement of Inchmaree clause "does not limit the coverage under the perils of the sea clause"), and *Olympia Canning Co.* v. *Union Marine Ins. Co.,** 10 F. 2d 72 (9th Cir. 1926).

5. It did not, in any event, apply a correct standard of "due diligence", even assuming the applicability of the "Inchmaree" clause. See: *Peter Paul, Inc.* v. *Rederi A/B Pulp,** 258 F. 2d 901, 906 (2nd Cir. 1958), cert. den. 359 U. S. 910.

V

Collateral Questions

A. On the question of the time bar provision in the Buffalo policy, the Court misapplied *Phoenix Ins. Co. of Hartford* v. *De Monchy*, 35 Com. Cas. 67.

See: *MacLeod Ross & Co.* v. *Compagnie D'Assurances Generales L'Helvitia De St. Gall,** (1952) All E. R. 331, (1952) 1 Ll. L. Rep. 12 (certificate of insurance separate contractual document).

B. With respect to the jury trial issue, the Court has overlooked a material fact and has misapplied certain legal principles in that:

1. Jury demand was *filed* in the State court (but with a mistaken caption).

2. A new issue with respect to jury trial can be raised on appeal. See: *Shokuwan Shimabukuro* v. *Higayoshi Nageyama,** 140 F. 2d 13 (D. C. App. 1944) and later cases referring to "fundamental error" affecting "substantial rights".

3. The district court abused its discretion. See: *Rehrer* v. *Service Trucking Co.,** 15 F. R. D. 113 (D. C. Del. 1953); *Wardrep* v. *New York Life Ins. Co.,** 1 F. R. D. 175 (D. C. Tenn. 1940); *Angel* v. *McLellan Stores Co.,** 27 F. Supp. 893 (D. C. Tenn. 1939).

VI

Miscellaneous

1. The Court has stretched (Op. p. 17) the District Court's finding (Op. p. 10) that it is "impossible to fix the exact date" of the changes in capacity and took no note of Elkin's *admission* (R. 1188) that he returned to the *Pacific Queen* on an afternoon subsequent to his initial survey for a further check. See: *Greenhill* v. *Federal Ins. Co.,** (1927) 1 K. B. 65, 68 (burden of establishing concealment is upon underwriters).

2. The Court erred in applying the "clearly erroneous" concept to numerous questions of law and mixed questions of law and fact.

3. The Court erred in applying (Op. p. 16) limitation of liability cases where insurance cases have already covered the question.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the questions raised herein may be presented and argued before this Court convened *en banc*.

Dated: New York, New York
August 31, 1962.

Respectfully submitted,

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CERTIFICATE

I, W. SHELBY COATES, JR. of counsel for petitioners-appellants, do hereby certify that in my judgment the foregoing petition for rehearing of these causes is well founded and that it is not interposed for delay.

/s/ W. SHELBY COATES, JR.

No. 17461 and No. 17460

United States Court of Appeals
For the Ninth Circuit

No. 17461 (formerly USDC WD Wash. No. 2543)

PACIFIC QUEEN FISHERIES, a partnership, (AUGUST P. MARDESICH, MIKE BAROVIC, JOHN BRESKOVICH, NICK JASPRICA, * * * JOHN K. VILICICH, *et al.*), d/b/a PACIFIC QUEEN FISHERIES, *Plaintiffs-Appellants,*

vs.

ATLAS ASSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, BUFFALO INSURANCE COMPANY, UTAH HOME FIRE INSURANCE COMPANY, and COMMONWEALTH INSURANCE COMPANY, *Defendants-Appellees,*

and

GEORGE HULL, WILLIAM PECK and O. E. ROYER, *Additional Parties at the Instance of the Court,*

No. 17460 (formerly USDC WD Wash. No. 2348)

(consolidated for trial with No. 2543)

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and

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L. SYMES, *et al.* (UNDERWRITERS AT LLOYDS and CO-INSURING COMPANIES at LONDON), *Defendants-Appellees.*

DEFENDANTS'-APPELLEES' (UNDERWRITERS') ANSWERING BRIEF

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April 6, 1962

THE ARGUS PRESS, SEATTLE, WASHINGTON

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No. 17461 and No. 17460

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DEFENDANTS'-APPELLEES' (UNDERWRITERS') ANSWERING BRIEF

I. STATEMENT OF JURISDICTION AND PLEADINGS

A. Jurisdiction of Trial Court

The trial court had original jurisdiction of both cases, No. 2543 and No. 2348, for diversity and amount under the provisions of 28 USC §1332 (R. 249; 49-50).

B. Jurisdiction of this Court

This Court has jurisdiction of these appeals under the provisions of 28 USC §1291. *No. 17461* was formerly No. 2543; and *No. 17460* was formerly No. 2348. Both appeals are from final judgments for defendants in both cases, filed and entered March 23, 1961 (R. 288-290). Notice of Appeal was filed April 16, 1961 (R. 296).

C. Designation of Parties

Appellant partners, d/b/a Pacific Queen Fisheries, et al., plaintiffs below in both cases, are herein termed *PQF.*

Appellees, Atlas Assurance Co., et al., defendants below in No. 2543;—and L. Symes (Underwriters at Lloyds) et al., defendants below in No. 2348; are herein collectively termed *Underwriters.*

Where relevant, individuals or companies will be identified by proper name.

D. Summary of Pleadings

In former No. 2543, the Trial Court on August 25, 1960, signed a comprehensive Pre-Trial Order (R. 196-222) which superseded the pleadings (R. 221-2).

Thereafter PQF moved for an order to consolidate a State Court case, No. 137440, with No. 2543. That State Court case involved the same issues. It had been previously removed as No. 2348, but was remanded to the State Court where it was still pending when No. 2543 was set for trial (R. 46-47).

PQF's motion to consolidate was granted, and former No. 2348 was accordingly returned again to the Federal Court for trial with No. 2543 (R. 223; 46-50).

PQF's Opening Brief, pp. 52-54, now challenges non-jury trial of No. 2348. Jury trial in No. 2543 had previously been

denied on August 15, 1960, under F. R. Civ. P. 38(d) (R. 298, 312), and again under F. R. Civ. P. 39(b) on September 28, 1960 (R. 223, 224). PQF's new contention as to the non-jury trial of No. 2348 was not raised in PQF's Statement of Points, which was addressed solely to the ruling of September 28, 1960 (R. 297a; cf. R. 223, 224). Underwriters will therefore need to summarize those relevant pleadings in the argument section of this Brief in answering PQF's new issue as to non-jury trial of No. 2348 after it was consolidated on PQF's request for trial with No. 2543. That summary is stated below in Underwriters' argument concerning jury trial.

II. OPINIONS BELOW

Five substantive opinions were rendered by the Federal Court:

A. Its oral opinion at pre-trial conference denying jury trial in No. 2543 under F. R. Civ. P. 38(b), decided August 15, 1960 (R. 298, 312);

B. Its Memorandum Decision in No. 2543 determining that English Law and Usage is applicable, and denying a Motion for Jury Trial as a matter of discretion under F. R. Civ. P. 39(b), decided September 28, 1960 (R. 224-226);

C. Its Oral Decision on the facts, of November 17, 1960 (R. 227-248);

D. Its Oral Decision on the Law, of March 23, 1961 (R. 290-295); and

E. Its Findings of Fact and Conclusions of Law, of March 23, 1961 (R. 249-287).

III. COUNTER-STATEMENT OF THE CASE

A. The Omissions and Inaccuracies of PQF's Statement Require a Counter-Statement.

Underwriters also regret the need for a counter-statement of the case. It would be unnecessary except that PQF's "statement" is misleading. While PQF's statement purports to "refer liberally" to the Coast Guard Report (PQF Op. Br. 3), it is studded with omissions and inaccuracies as illustrated below, pp. 23-24.

Underwriters adopt the Findings of Fact of the Trial Court as their statement. Since PQF's Opening Brief fails to state

> "As particularly as may be wherein the Findings of Fact * * * are alleged to be erroneous." (Rule 18, subd. 2 (d)),

Underwriters have italicized all portions of the Court's Findings which appear to be challenged directly, indirectly, or even implicitly by PQF. In each such case, the entire Finding of Fact is reproduced in Appendix V of this Brief, together with record references to support each finding. Underwriters have shortened their counter-statement by deleting findings such as those relating to jurisdiction, etc. In such cases, they have included the title of the finding and indicated the deleted portion by asterisks.

B. Underwriters' Statement Is Based Entirely on the Court's Findings of Fact; as Follows:

"Findings of Fact

"I.

"Jurisdiction of This Court [R. 249]

* * *

"II.

"Identity of Parties and Amounts Involved

* * *

"* * * George Hull, William Peck and O. E. Royer, designated in No. 2543 as 'additional parties at the instance of the Court,' and in No. 2348 as 'additional plaintiffs,' are residents and citizens of the State of Washington and *each of them had acquired interests in 'Pacific Queen Fisheries'* from John Breskovich, one of the named plaintiffs, when he sold portions of his interest to them in 1951-53. (Exs. 369 ff.) [R. 250]

"III.

"Trial to the Court

"Trial was to the Court. A jury trial was tardily asked in No. 2543, but was held to have been waived because the demand was not timely. *No jury trial was demanded in No. 2348.* At plaintiffs' request the two cases were consolidated for trial. [R. 251]

"IV.

"Court's Oral Decision on Facts
incorporated by reference [R. 251]

* * *

"V.

"Description of Pacific Queen and her ownership

"A. The D/V Pacific Queen was built in 1943 for the United States Navy as a salvage vessel (ex USS Anchor, ARS-13). She was a vessel of composite construction having a wooden hull and structures with steel decks and deckhouse. She was 988 gross tons, 672 net tons, 173 feet length, 37 feet width, and 18.8 feet depth, propelled by 1600 HP twin-screw Diesel engines. For her Navy salvage operation, she had been outfitted with two 1500 gallon gasoline tanks. These were equipped with an aqua or hydraulic system which dispensed gasoline by injecting water through interior piping into the tanks. This forced the gasoline of lighter specific gravity to rise. It was then transferred through permanent piping to pumps and discharge valves located above deck. This was a very safe system, but in 1949, pursuant to Coast

Guard orders when the Pacific Queen was chartered to carry cargo to Hawaii, it was blanked off and disconnected, and the two gasoline tanks filled with water. (Pl. Ex. 30). [R. 252]

"B. The Pacific Queen had been bought as war surplus from the government in 1948 by an individual who resold her to Pacific Boatbuilding Company, a corporation then controlled by plaintiff John Breskovich. It, in turn, resold the vessel in 1949 to the named plaintiffs, or their predecessors in interest, and thereafter John Breskovich sold portions of his interest to George Hull, William Peck and O. E. Royer as described above.

"VI.

"Loss by *Gasoline* Explosion

"The Pacific Queen became a total constructive loss on September 17, 1957, because of a violent *gasoline* explosion. One of two crew members quartered aboard the vessel lost his life. The other escaped and was one of the principal witnesses at the subsequent Coast Guard hearing described below. [R. 253]

"VII.

"Coast Guard Investigations and Report [R. 253]

* * *

"* * * the Court finds that the substance of said Findings of Fact and Conclusions (of fact) of the Coast Guard (Ex. 30, 31, 32) are true and correct, and hereby incorporates them by reference and adopts them as its own.

"D. Supplemental thereto, this Court makes its additional Findings of Fact as set forth below.

"VIII.

"Plaintiffs Failed to Disclose to Underwriters their Subsequent Carriage of Bulk Gasoline

"A. Beginning in 1950, plaintiffs operated the Pacific Queen between Puget Sound and Bristol Bay, Alaska, as a refrigerated vessel to freeze and transport catches of salmon from Alaska to ports on Puget Sound, Washington.

Until 1951, regulations of the U .S. Fish and Wildlife Service prohibited the use of power-driven fishing boats in Bristol Bay. This was a fish conservation measure. The small fishing boats known as gill-net boats were moved only by sail and oars. In 1951, this regulation was relaxed and power boats up to 32 feet in length were permitted. Many such boats are now powered by gasoline; others are powered by diesel oil fuel. Gasoline is a far more hazardous commodity than diesel oil to use or to transport, especially unless it is stowed or dispensed from safe containers. Gasoline and diesel oil are obtainable in Alaska from various sources including tank vessels, scows, barges and shore facilities. [R. 255]

"B. In 1951, the very safe Navy aqua system of transporting and dispensing gasoline above deck from the 2 gas tanks of the Pacific Queen was modified by adapting a portion of its interior piping into a pumping system creating a vacuum method whereby gasoline was pumped through permanently enclosed internal steel pipes to fixed piping for discharge above deck. This was also a safe system to transport and discharge gasoline.

"C. During the years beginning 1950, plaintiffs insured the vessel with various insurance companies including some, but not all, of the respective defendants which insured the vessel in 1957.

"D. During the years between 1950 and 1957, plaintiffs placed this insurance through various marine insurance brokers whom they selected. Sometimes plaintiffs selected Hansen & Rowland as their marine insurance brokers. In other of these years, plaintiffs selected Robt. Fleming, or McGraw, Kittinger & Case, or various other marine insurance brokers through whom plaintiffs placed the insurance on the Pacific Queen.

"E. On various occasions between 1950 and 1957 before each year's fishing season began, plaintiffs, through these respective brokers, requested that the vessel be surveyed by the Board of Marine Underwriters of San Francisco, or by

United States Salvage Association.

"F. On other occasions between 1950 and 1957 plaintiffs, through their brokers, requested that the [R. 256] vessel be surveyed by other well recognized and competent marine surveyors; such as Alexander Gow, Inc. in 1950 (Ex. 348), or Captain Adrian Raynaud in 1953 (Ex. 363). Neither of these surveyors reported the existence of any gasoline or gasoline tank capacity aboard the Pacific Queen.

"G. About May 3, 1955, Hansen & Rowland, acting as brokers for plaintiffs, requested United States Salvage Association to make a condition survey of the Pacific Queen. The Association assigned this duty to one Edward Marquat, an experienced surveyor, since deceased. Plaintiffs volunteered that he was an 'exceptionally careful and meticulous' surveyor. His condition survey report comprises a 6-page single-space report. It is dated May 13, 1955. With respect to gasoline, his report read in full text:

" 'Fuel and Water Capacities:

Fuel	49,000	gallons
Water	14,000	"
Gas	3,000	"

'(Gasoline tanks under deck aft, proper filling lines and vents to atmosphere).'

"H. The partnership of Pacific Queen Fisheries knew that this was the only information that any of the Underwriters had because, in 1956, one of the active partners of Pacific Queen Fisheries, John Vilicich, asked for and received from Hansen & Rowland a copy of the above 1955 Marquat report. [R. 257] Vilicich was experienced in the marine insurance business, since he was also d/b/a Commercial Marine Agency, and he was familiar with such surveys.

"I. The Pacific Queen did not engage in Alaska operations in 1956, but remained in lay-up status.

"J. About May 2, 1957, Hansen & Rowland, again acting as brokers for plaintiffs, requested United States Salvage Association to make a condition survey. This time they

particularly requested a survey of two newly purchased gillnet boats, and incidentally of the Pacific Queen (Lees' Dep. Ex. 405, p. 25; Elkins' Dep. Ex. 399, p. 31-2, 57-8; Broz Dep. Ex. 394, p. 20). This time the surveyor was J. E. Elkins, also a very experienced surveyor. His only prior survey of this vessel had been made in 1949 at which time no gasoline was being carried by the vessel. Elkins made his 1957 survey on May 2, 1957. Elkins' 1957 survey, like Gow's 1950 survey and Raynaud's 1953 survey, made no reference whatsoever to gasoline tank capacity, or to any bulk gasoline carried aboard the vessel. He reported the vessel was a mothership for gas-powered gillnet boats, but as stated above, bulk gasoline is obtainable from various sources in Alaska. Copies of Elkins' 1957 survey reports were furnished to plaintiffs' brokers, Hansen & Rowland, who, through its Mr. Duren, called on defendants on May 14 or 15, 1957, at San Francisco to place the insurance. He does not recall whether he took the 1957 survey with him but does recall seeing that the survey said nothing about gasoline. At that time he had [R. 258] not been told by the owners, and did not know about any increase in gasoline capacity, or of any changes in gasoline discharge methods, nor did he advise defendant insurers of these facts.

"IX.

"Plaintiffs' Changes in Bulk Gasoline Conditions Aboard the Pacific Queen were Material Increases in the Risk

"A. At the time of the explosion on September 17, 1957, the gasoline tank capacity had been increased from 3,000 to 8,000 gallons. Plaintiffs now contend that, sometime before the Marquat survey of May, 1955, the gasoline tank capacity of the Pacific Queen was increased to 8,000 gallons by filling 2 tanks, theretofore used for diesel fuel, with 5,000 gallons of gasoline; and that certain hazardous alterations, for discharging this gasoline as described below, had already been accomplished.

"B. *But any evidence of this is incredible.* As recently as

June, 1960, at a pre-trial deposition, plaintiffs' counsel stipulated that any such alterations in gas tank facilities were made some time after the end of the 1955 season and before the beginning of the 1957 season. (Breskovich Dep. Ex. 393, p. 87). The 1957 season did not begin until May 24, 1957, when 8,000 gallons of gasoline were loaded aboard before the Pacific Queen sailed to Alaska. *In other respects plaintiffs' evidence on this matter was conflicting and obscure. It is impossible to fix the exact date of these changes* [R. 259] *because the owners failed to come forward with any information until very late, and the information then offered was exceedingly vague and unsatisfactory.*

"C. *Based upon all of the evidence, the Court finds that, at some date subsequent to the 1955 survey, and prior to the attachment date of the insurances on May 24, 1957, the plaintiff owners and managers of the vessel had increased the gasoline-carrying capacity of the Pacific Queen from approximately 3,000 gallons to 8,000 gallons.* This alone was a material increase in the risk *which was not disclosed to the Underwriters.*

"D. An even greater *undisclosed* increase in the risk was accomplished at that same time by making the following extremely hazardous alterations in the method of discharging gasoline. Plaintiffs inserted interior below-deck exposed gasoline-discharge valves into fittings that had been designed and used for insertion of permanently secured drainage plugs. These valve replacements were located in or near a passageway where ship's equipment, fishing gear and personnel frequently passed.

"D[1][1] The increase in the risk in both particulars is an obvious fact that should have been known to anyone with a minimum of experience or understanding. It was certainly known to the owners of the Pacific Queen, and was virtually admitted by them. The installation of interior below-deck discharge of gasoline through the type of facilities that were provided on the Pacific Queen is so pat-[R. 260]ently an

[1] "D" repeated in original. Marked "D-1" herein to distinguish it.

increase in hazard as hardly to require expert testimony. It is impossible to defend as safe or proper such a system of discharge with hand valves located on or near a passageway where ship's equipment, fishing gear and personnel frequently pass back and forth.

"E. This altered method adapted by the Pacific Queen for the handling of gasoline was not in common usage, but was exclusive to the Pacific Queen. It was not used even on other vessels in which some of the owners of the Pacific Queen had, and have, an interest. (Mardesich dep. Ex. 406, pp. 8-10).

"X.

"Plaintiffs failed to Disclose these Material Increases in the Risk to Hansen & Rowland or to Defendants

"A. Plaintiff August Mardesich *was the Manager* of the Pacific Queen in 1957. He was not quartered or employed aboard the vessel in any capacity. He had personal knowledge of the gasoline tank and discharge changes which rendered the vessel extremely hazardous and which materially increased the risk. Neither he nor any of the other partners disclosed these changed conditions to the Underwriters.

"B. *The increased gasoline capacity and the hazardous modifications of the discharge system were not made at a time or under circumstances such as to bring them to either the actual or the constructive notice of the Underwriters.* [R. 261]

"C. The owners and managers of the Pacific Queen knew of these changes and did not disclose the increased gasoline capacity, or the altered and hazardous gasoline-discharge methods, to the defendant underwriters or to Hansen & Rowland, who were brokers for the owners, or to the surveyors.

"D. Neither Marquat, now deceased, who made an insurance survey in 1955, nor Elkins, since retired, who made the survey in 1957, knew of the increased gasoline capacity or of the unsafe and improper gasoline-discharge facilities at the time of their respective surveys, *and there was nothing*

observable by any reasonable inspection which would have disclosed the changes.

"E. At the time of the surveys by Marquat *and Elkins* there was nothing in the situation that was observable, by reasonable inspection, which would have disclosed that the owners and managers had made or intended to make the changes in gasoline capacity or discharge faciltiies which existed at the time of the loss of the Pacific Queen. Plaintiffs' counsel now claims, on brief, that, whenever these changes were made, they were 'a simple job that would not take two men 30 minutes.' (Pl. Memo on law issues filed pursuant to Court's Oral Decision, Doc. 136, p. 8, line 11).

"F. Both of the surveyors are described by everyone who has spoken to them as having been marine surveyors of the highest ability, character and integrity, who would not have overlooked or dis-[R. 262]regarded anything of the magnitude of the increase in the risk here described if it had been actually conveyed to them. Marquat was particularly meticulous in the survey work that he did. It is inconceivable, and there is no credible evidence to the contrary, that he had, either by any oral statement made to him or by anything that could or should have been seen in making his survey, any knowledge which would have disclosed either the increased gasoline capacity or the change in discharge facilities that existed at the time of the loss.

"G. At the time of the 1957 survey Elkins was asked primarily to survey the new gillnetters, and incidentally 'to take a quick look at the Queen.' No representative of plaintiffs identified himself when Elkins surveyed the Pacific Queen, though Jasprica was present and failed to do so.

"H. Had either of the surveyors, Marquat or Elkins, actually known of the increased gasoline capacity or of the unsafe and improper gasoline-discharge facilities at the time of their respective surveys, they would not only have reported the same in their surveys but would have required correction of the facilities prior to the issuance of insurance.

"I. This loading of gasoline on board and the altered dis-

charge methods were done with the knowledge of plaintiffs' manager and owner, August Mardesich, and of the other partners, including [R. 263] Mr. Barovic, Mr. Breskovich and Mr. Jasprica. The latter occupied several roles as part-owner, chief-engineer and fishing-superintendent.

"J. Each of the changes constituted a material increase in the risk *which was concealed from and not disclosed to defendants.*

"K. The material increases in the risk arose when the altered gasoline-discharge facilities were installed and gasoline-carrying capacity more than doubled, and such greatly increased quantities loaded on board under such hazardous conditions. At that time, the owners either knew or, in the exercise of the most minimal standards of prudence and care, should have known of the increase in risk by reason both of the increase in carrying capacity of gasoline and, even more emphatically, by reason of the changed gasoline discharge methods to an extremely hazardous below-deck system.

"L. Defendants would not have insured the vessel if plaintiffs or their brokers had disclosed to them any or all of these material increases in the risks.

"XI.

"The Pacific Queen was repeatedly sent to Sea in an Unseaworthy State with the Privity of the Owners

"A. *The Pacific Queen was unseaworthy each time she was sent to sea on and after May 24, 1957.* The Pacific Queen was unseaworthy when she left for her 1957 voyage by reason of the hazardous con-[R. 264]dition caused by the increased gasoline-carrying capacity and, to an even greater extent, by reason of the changed method of piping, valving and internal methods of discharge of gasoline. This system was grossly unsafe and improper, and created a great and serious hazard to life and property. The owners were privy to this unseaworthiness, and knew of these conditions and

neglected to take reasonable precaution to correct these deficiencies and to make her seaworthy.

"B. After the Pacific Queen returned from Alaska, she shifted to various Puget Sound docks and was then sent *to sea* from Seattle to Friday Harbor, Washington. The hazardous gasoline condition remained uncorrected, and she was still in an unseaworthy state with privity and knowledge of her owners, and of her manager.

"C. While she was at Friday Harbor, she still had on board some remaining 2,000 gallons of gasoline. (USCG Report, Ex. 30, p. 4). On September 9, 1957, at Friday Harbor, from 500 to 600 gallons of gasoline were spilled from one of the four tanks in the hold of the Pacific Queen into the interior of the vessel. Although now minimized and treated as trivial by plaintiffs, this was a catastrophe of major proportions. It created great hazards to the ship, life and property, both then and later. Gasoline from the spill soaked and impregnated large parts of the wooden hull and structure of the vessel. It was not a sudden spill but began early in the evening preceding its discovery at 4 a.m. by the [R. 265] cook. In the course of the spill, liquid gasoline and gasoline fumes permeated the lower after portion of the vessel. The spill was reported to one of the plaintiff owners and the manager of the vessel, August Mardesich, while he was in Friday Harbor on September 9, 1957. He inspected the vessel, but did not give any specific orders as to the methods to be used in cleaning up the vessel, did not order any chemical tests to be made as to whether she was gas-free, and did not order any plugging-up of the valves on the other gasoline tanks to prevent further similar spills; nor did he order the discharge of the remaining gasoline from the other tanks. The methods that were taken to purge the vessel of the gasoline were not adequate and did not constitute the exercise of due diligence considering the serious nature of the spill. On this question the testimony of Mr. Kniseley and Mr. Spaulding, both men of extensive practical experience in this field as well as possessed of great theoretical knowledge, is unquestionably correct that the meas-

ures taken to clean up the spill were inadequate. In addition to Mr. Mardesich, Mr. Jasprica, also an owner of the Pacific Queen, was present at the time of the spill and participated in the inadequate clean-up measures. The vessel was unseaworthy after the Friday Harbor spill for want of full and proper precautions to clean and purge the ship after the spill. She was also unseaworthy because of the continuing hazard of her altered method of [R. 266] gasoline discharge, and the absence of precaution to prevent further spills resulting in extremely hazardous below-deck carriage of bulk gasoline. A plug was put into the valve on one of the tanks but no precautions were taken to prevent similar spills from the remaining three tanks. All of the plaintiffs' witnesses, including two of the part-owners, who were experienced in the handling of gasoline, agreed that this was a serious want of due diligence. All of defendants' witnesses agreed that it was extraordinarily hazardous to permit a vessel to be in such condition, or to send the vessel to sea in such condition, and that it might take a period of weeks before the vessel was sufficiently gas-free to operate with safety.

"D. It is interesting to note that the Friday Harbor spill was first discovered at 4 o'clock in the morning by the cook who was sleeping in his quarters on the main deck to which the fumes were wafted while the vessel was in a dead state with its ventilation not operating. It is probably more than coincidental that 8 days later, in Tacoma, at exactly the same time under almost identical conditions, the next time the ship's ventilation was shut down, the explosion took place in an area between the place of the spill and the location of the crews' quarters.

"E. The vessel was sent *to sea with the privity of the owners and managers* in an unseaworthy condition from Friday Harbor to Seattle where she [R. 267] remained a few days exposed to the same hazards and tied up at an oil dock where great hazard to life and property was continuously threatened. She then was again sent to sea from Seattle to Tacoma under the same extremely hazardous conditions.

"F. By reason of the continuing hazardous and unsafe method of discharging gasoline and by reason of the failure properly to clean up after the Friday Harbor spill, the Pacific Queen was again sent *to sea* in an unseaworthy condition when she left Seattle for Tacoma two days prior to her explosion and loss.

"G. The day after her arrival at Tacoma, while still in such perilous and unseaworthy condition *with the privity and knowledge of her assured owners and managers,* she exploded and became a constructive total loss with loss of life, and destruction of property. Her continuous unseaworthiness until her fatal explosion was a proximate cause of her loss.

"XII.

"The Destruction of the Pacific Queen was Caused by a *Gasoline* Explosion

"A. *Based on the overwhelming preponderance of the evidence,* the constructive total loss of the Pacific Queen was the result of a *gasoline* explosion. *There is no credible or reasonable direct evidence or inference from the evidence to the contrary. The explosion was of gasoline and gasoline vapors from* [R. 268] *the prior spill into the interior of the vessel at Friday Harbor. The fire which followed the destructive explosion was primarily of this gasoline and gasoline vapors feeding on the wooden members of the then shattered hulk of the Pacific Queen as she was sinking to the shallow bottom. But the explosion had already caused such extensive wreckage as to render her a constructive total loss irrespective of the subsequent gasoline flames touched off by the explosion which engulfed the wrecked vessel and though intense were soon extinguished.*

"B. *There is no credible evidence of arson. The Tacoma Fire Department, the Tacoma Police Department,* and the United States Coast Guard *all* made extensive investigations and none found any basis for such a conclusion. *No further evidence whatsoever as to arson or other wrongful acts by third persons was adduced in the extensive pre-trial*

depositions, or at trial; and the Court finds there is no basis in fact for any such contentions. The explosion was due to accumulated gas vapors that created a most perilous condition, and to accidental ignition possibly by the deceased crew member or some other chance spark.

"C. *There was no pre-existing fire in the Pacific Queen preceding the explosion. The gasoline explosion was the proximate cause of the constructive total loss of the vessel. The source of ignition is unknown. It could have been a spark from a cigarette, or a match, or an electric contact, or other* [R. 269] *accidental source; but the explosion resulted from a want of due diligence by the assured owners and manager to remedy the extremely hazardous conditions which existed from the time of the gasoline spill.*

"D. *The possibility that it was an ammonia explosion is, at the very best, not any more than remote and unlikely speculation.* Captain Buckler's testimony to the effect that he now believes the explosion to have been of ammonia origin was arrived at shortly before trial in conference with plaintiffs' counsel, and without his being in possession of any additional facts other than those on which, a few months earlier, he had based his prior written survey opinion that the cause of the explosion was unknown. Plaintiffs' expert witness, Mr. Sax, based his opinion that the explosion was of ammonia origin on an inadequate examination of the vessel and on assumed facts which were not supported by the evidence.

"E. Testimony, introduced by the plaintiffs, of witnesses living within a few hundred feet of the explosion, who were immediately awakened and could observe its inception, reported a ball of orange fire and of black smoke at the time of the explosion. Such a characteristic is consistent only with an explosion of gasoline vapor origin. It is not consistent with one of ammonia origin. Plaintiffs' expert, Mr. Sax, also concedes this fact. *The ammonia odor at the scene of the catastrophe was* [R. 270] *from ammonia remnants in a refrigeration system that had previously been completely*

pumped down. The odor is very noxious and can arise from small traces or quantities.

"F. Moreover, and more importantly, the theory of an ammonia explosion is based entirely upon the additional hypothesis that a severe fire existed in the engine room prior to the explosion. *The Court's personal examination aboard the hulk of the Pacific Queen and the photographs in evidence show, beyond the slightest question, that no fire existed in the engine room prior to the time that the forward bulkhead in the engine room was blown off its flanges. This occurred at the time of the explosion. The char in the engine room and behind the flanges is easily explicable by the fury of the fire after the explosion. This is illustrated by the photographs taken by Mr. Kollar.*

"G. The Court was much more favorably impressed by the testimony of defendants' witnesses, Professor Moulton, Mr. Kniseley and Captain Lees, not only by reason of their greater scientific qualifications and practical experience and ability in the areas as to which they testified, but also because they were much more adequately apprised of the true facts of the explosion and fire.

"H. *The peculiar internal system of ventilation and the path of air on the Pacific Queen, unaided by mechanical ventilation, so graphically illustrated at the time of the Friday Harbor spill, resulted* [R. 271] *in the presence in the upper port forward engine room of an explosive mixture of gasoline vapors with air at the time of the explosion which mixture was the explosive agent and cause of the loss of the Pacific Queen.*

"XIII.

"The Owners and Manager of the Pacific Queen Did Not Use Due Diligence to Prevent the Loss of the Pacific Queen by Explosion.

"A. Some of the owners and the manager of the Pacific Queen, Mardesich, were privy to, and had thorough knowledge of the dangerous conditions aboard the Pacific Queen

from the time 8,000 gallons of gasoline were loaded in May 1957, to the date of the explosion on September 17, 1957. The owners and the manager, Mardesich, failed to use due diligence and were grossly negligent in preventing the loss of the Pacific Queen by explosion in at least two respects:

"1. First, as outlined above, at some time between 1955 and May 24, 1957, they were privy to and knew they had converted the gasoline discharge facilities of the Pacific Queen in such fashion as they became totally improper and unsafe. This improper and unsafe system was a proximate cause of the explosion and resultant destruction of the vessel.

"2. Second, the owners and manager of the Pacific Queen *were privy to the Friday Harbor spill and failed to use due diligence and were grossly* [R. 272] *negligent* in the steps taken towards cleaning up the results of the Friday Harbor gasoline spill and to purge the vessel and its structures of gasoline and gasoline vapors, all with the actual knowledge and acquiescence and direction of owner *and manager Mardesich, as well as of owner,* superintendent and chief engineer Jasprica.

"B. *The manager,* Mr. Mardesich, *was especially privy to all of these conditions.* He knew of the alterations of the tanks; of the loading of 8,000 gallons of gasoline; of the extreme hazard of exposed interior valves; and of the serious gasoline spill at Friday Harbor; and he personally inspected the vessel at that time, *but he failed to exercise due diligence to purge her of gasoline and fumes,* or to remove the remaining bulk gasoline, or to make any gas-free tests, or to secure and plug the drain-valves in the other tanks. Considering the serious nature of the spill, the measures taken by the owners and manager to purge the Pacific Queen of gasoline and gasoline vapors were not adequate in the exercise of due diligence.

"C. *The subsequent explosion and destruction of the Pacific Queen were proximately caused by these failures by*

the owner or manager to use due diligence. This failure to use due diligence was with the privity and knowledge of the owners, and of the manager, Mardesich. He was fully informed but treated the hazardous loading, stowage, and subse-[R. 273]quent large spill of gasoline with such a casual indifference *as to amount to gross negligence and an extraordinary want of due diligence.*

"XIV.

"Plaintiffs had Imputed Knowledge of the Tanker Act and of Coast Guard Regulations which made it Unlawful to Transport Bulk Gasoline without a Certificate

"A. In 1949 plaintiff John Breskovich, as one of the owners of the Pacific Queen, chartered her to sail to the Hawaiian Islands, carrying refrigerated cargo during the time of a maritime strike. Incident to such use, he was required to have the vessel inspected by Coast Guard inspection, which required the vessel to make certain changes before she sailed, including the following:

> '2-2000-gal. gasoline tanks aft of compressor room to be pumped dry of gasoline, lines disconnect(ed) & tanks filled with water & plugged.' (Emphasis supplied in original.)

"B. Plaintiff John Breskovich had actual knowledge of the existence of the Tanker Act by reason of his compliance with the Coast Guard regulations thereunder in preparing the Pacific Queen for a cargo voyage to Hawaii in 1949.

"C. Plaintiff John Vilicich had actual knowledge of the Coast Guard's contention that the Tanker Act was applicable to the Pacific Queen and reefer fishing vessels by August 1957 because the Alaska Reefer, another vessel of which he was also a part-owner, was cited for a violation of the Tanker[R. 274]Act by the Coast Guard for transporting bulk gasoline without inspection and certification as to safety. He knew this at least three weeks before the Friday Harbor spill.

"D. Plaintiff August P. Mardesich is a graduate of the University of Washington Law School, a member of the Washington State Bar Association and majority leader of the legislature. He also knew of that claim of the Coast Guard prior to the time the Pacific Queen was sent to sea to Friday Harbor because he was told in August, 1957, by Steve Vilicich, the brother of John Vilicich and another owner of the Alaska Reefer, of the citation of that vessel for a violation of the Tanker Act. This was three weeks before the Friday Harbor spill.

"E. Each of the three managing owners of the Pacific Queen, in its earlier years, were men of wide business experience and standing in the community. Each knew of the Tanker Act.

"XV.

"The Pacific Queen was in Continuing Violation of the Tanker Act Through the Fishing Season of 1957

"A. *In 1957 gasoline was carried as cargo.* It was sold to some independent fishermen. It was one of the concessions given to other independent fishermen to get them to fish for the Pacific Queen. More than 4% of the 8,000 gallons of gasoline carried to Alaska[R. 275]was sold to independent fishermen Pearson and Vistad. This amount constituted more than 6% of the number of gallons of gasoline actually used in the 1957 fishing season by the Pacific Queen.

"B. Under the 1957 joint venture agreement between Pacific Queen Fisheries, Pacific Reefer Fisheries, and North Star Fisheries, only 8 of 20 gillnet boats carried aboard the Pacific Queen belonged to Pacific Queen Fisheries. Nine belonged to Pacific Reefer Fisheries, one to North Star Fisheries, and two were independents. Under the terms of the joint venture agreement, the Pacific Queen agreed to supply gasoline for all of these other gillnet boats except the independents to whom it sold gasoline. Thus, well over 50% of the gasoline carried aboard the Pacific Queen was intended

for gillnet fishing vessels, other than those belonging to the Pacific Queen.

"XVI.

"Insurance and Premiums

* * * [R. 276]

"XVII.

"Determination of English law and usage

* * *

"XVIII.

"A gasoline explosion by accidental source was reasonably foreseeable

"A gasoline explosion such as that which happened was reasonably foreseeable in the exercise of due [R. 277] *diligence by the owners and managers of the Pacific Queen. The vessel permeated with gasoline fumes was a 'floating time bomb' which would explode by a spark from any source.* She lay at a public dock frequented by ships' personnel, fishermen, sightseers, and visitors. In the summertime, is 'loaded' with people 'who go for recreation' and 'plenty of lovers sometimes go to park.' (Ex. 233, Nevens, pp. 12-13). With knowledge that this vessel was *permeated with gasoline fumes,* and in a frequented public place, the owners and manager took no steps to provide a watchman or warn crew members not to smoke or light matches, etc. *The explosion was reasonably foreseeable in the exercise of ordinary care or reasonable diligence.*

"XIX.

"Effect, if Coast Guard Inspection had been made

"If the vessel had been inspected by the Coast Guard, the gasoline discharge facilities below deck would not have been approved. (Opinion, Doc. 132, p. 21).

"XX.

"Intermediate Facts Incorporated by Reference

"In arriving at the foregoing Findings of Fact, this Court has considered all of the various matters of proof presented. Those not specifically mentioned in the Findings

have been deemed intermediate in the process of ascertaining the ultimate facts. [R.278].

* * *

"Done in Open Court this 23rd day of March, 1961.

/s/ GEO. H. BOLDT
United States District Judge.

"[Endorsed]: Filed March 23, 1961." [R. 287]

C. The Court's Findings Are in Sharp Contrast to PQF's Statement of the Facts.

For space limitations, Underwriters will here point out only three out of many examples of errors and omissions in PQF's Statement of Facts. After admitting that appellant August Mardesich was manager of the Pacific Queen in 1957, PQF's statement goes on to add that:

> "His managerial role in connection with the PACIFIC QUEEN was primarily in the realm of finance and banking." (PQF Br. 7).

It is true that Mr. Mardesich did, at one point, make such an exculpatory remark (R. 325, 337). Elsewhere Mr. Mardesich admitted to being in full charge of all of the operations of the PACIFIC QUEEN, including the determination to increase its gasoline-carrying capacity (R. 994). He admitted:

> "I ordinarily make all kinds of arrangements before the ship leaves. I would be supplying, fueling, and in a general way I don't take care of those things myself, but I make sure they are done; hiring of fishermen, making arrangements for the purchase of nets, all those things that go into the operation." (R. 983).

Breskovich, Hull and Jasprica all made the same point. (R. 1314, 1334, 1501, 1582-1583). Jasprica summarized it by saying:

> "* * * Augie (Mardesich) * * * told the skipper how far he is supposed to go. I can't go over Augie, you know. *Augie is the boss.*" (R. 1596; emphasis added.)

Even more misleading is PQF's statement, for which it also cites the Coast Guard Report, that:

> "Pacific Queen was also equipped to carry, in four steel tanks located below deck in the after end of the vessel, gasoline to be utilized by her gillnetters during fishing operations." (PQF Br. 4).

In fact, the cited portion of the Coast Guard Report actually states that:

> "Construction of the vessel's four bulk gasoline tanks and their operational use *on the last voyage* (*1957*) is described as follows: * * * (R. 1058; emphasis added).

Still more misleading is PQF's statement interwoven into its argument, and for which it cites the Findings of Fact, that:

> "The lower court concedes 'there was ammonia odor at the scene of the catastrophe'." (R. 270) (PQF Op. Br. 18)

and then quotes the Coast Guard report and argues that ammonia was present in a "goodly quantity." (PQF Op. Br. 19) We do not quarrel with the right to argue any plausible theory, but if Findings are quoted they should be fairly stated. What the Court said at the cited page follows:

> "The ammonia odor at the scene of the catastrophe was from ammonia remnants in a refrigeration system that had previously been completely pumped down. (cf. R. 591-4). The odor is very noxious and can arise from small traces or quantities." (R. 270-271)

Record support for each of the possibly challenged Findings as italicized above is shown in Appendix V.

D. All of the Court's Findings Are Supported by Substantial Evidence and None Is "Clearly Erroneous".

Underwriters are similarly prepared to document all of the other findings with record references which show that none of the findings are "clearly erroneous" (F. R. Civ. P. Rule 52 (a)), but, on the contrary each is supported by substantial evidence.

IV. QUESTIONS PRESENTED

A. Should the appeal be dismissed by reason of PQF's flagrant violation of Rules 17 and 18 of this Court in:

1. Failing to designate more than a fragment of the material evidence;
2. Failing to specify alleged errors with particularity;
3. Combining numerous alleged errors into single statements of alleged error;
4. Failing to prepare a table of exhibits?

B. Is PQF bound by its Stipulation that English Law and Usage shall govern?

C. Should the judgment be affirmed on the merits by reason of an affirmative answer to any one of the following questions, all of which were answered in the affirmative by the Trial Court?

1. Was the alleged insurance void *ab initio* under Sections 17 to 20 of the Marine Insurance Act, 1906, because PQF's owners, managers and brokers failed to disclose to and concealed from the Underwriters, before the insurance was issued, material increases in the risk relating to the stowage, carriage, dispensation, and use of bulk gasoline by the PACIFIC QUEEN, thus causing the Underwriters to issue hull insurance

which they would not have issued if the true facts had been disclosed? (Concl. IV, R. 280).

2. Was the PACIFIC QUEEN repeatedly sent to sea in an unseaworthy state with the privity of the insured, in violation of § 39(5) of the Marine Insurance Act, 1906; originally by reason of its unique and undisclosed extraordinarily hazardous methods of stowage, carriage, dispensation and use of bulk gasoline; and, in addition, after a spillage of some 600 gallons of bulk gasoline into the interior of the vessel, for want of due diligence in cleaning and purging the vessel, and in permitting quantities to remain in the tanks exposed to danger of further spills? (Concl. V, R. 281).

3. Was the constructive total loss of the PACIFIC QUEEN by a gasoline explosion specifically exempted from insurance coverage under the terms of the Inchmaree clause by reason of the fact that it resulted from want of due diligence by the owners and managers of the vessel? (Concl. VI, R. 282).

4. Did PQF violate the implied warranty of § 41 of the Marine Insurance Act, 1906, that the adventure is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner, by causing the PACIFIC QUEEN to transport bulk gasoline as cargo in violation of the Tanker Act, 46 USC § 391a? (Concl. VII, R. 284).

   (a) Was the unlawful failure of PQF to secure inspection by the United States Coast Guard of the gasoline facilities of the PACIFIC QUEEN, and their failure to correct these facilities in a manner which the Coast Guard would have required upon inspection, a concurrent proximate cause of her constructive total loss; and, if so, was this violation of law an additional element of want of due diligence by her owners and manager that excludes liability under the Inchmaree clause, and of unseaworthiness with privity of the owners in vio-

lation of § 39(5) of the Marine Insurance Act, 1906; and if so, did each of these failures to exercise due diligence also proximately contribute to the explosion and constructive total loss of the PACIFIC QUEEN? (Concl. VII, IX, R. 284-285).

D. Did the Trial Court properly decide the three following collateral questions?

1. Did the trial court properly conclude that the "additional parties" named at the instance of the court, Messrs. Hull, Peck and Royer, were partners in PQF, and that any admissions by them constituted admissions against the interests of the partnership? (Concl. X, R. 285-286).

2. Did the trial court properly conclude that PQF delayed so long in bringing suit in No. 2543 against defendant Buffalo Insurance Company as to effect a time bar within the meaning of its policy? (Concl. XI, R. 287).

3. Did PQF's oral motion in No. 2543 to consolidate No. 2348, then pending as a State Court case after earlier remand, for trial with No. 2543, which had already been assigned for trial, create any rights to jury trial of No. 2348, where PQF had admittedly waived such right in No. 2543 and did not perfect such a right in No. 2348 in the State Court; and where PQF made no motion or intimation to the Federal Court concerning jury trial of No. 2348 when it orally moved to consolidate it with No. 2543, or when PQF was requested by the Federal Court Clerk to physically remove the files in No. 2348 from the State Court for filing in the Federal Court, or prior to commencement of a non-jury trial of both cases on such consolidated record, or during said non-jury trial, or by motion for a new trial after the Court had rendered its opinion in favor of Underwriters, or in settling the Court's proposed Findings, Conclusions, and Judgment; or in its Statement of Points on appeal to this Court; or at any other time until filing its Opening Brief herein?

V. CONCISE SUMMARY OF ARGUMENT

A. The judgment should be affirmed or the appeal dismissed because of serious violation of this Court's rules, as enumerated in Questions Presented and briefed in the following section.

B. English Law and Usage is applicable and supports the judgment on the merits (Concl. III, R. 279).

C. There are four independent and separate grounds for affirming the Trial Court's Findings, Conclusions and Judgment:

1. The policies were void *ab initio* and did not attach because of non-disclosure or concealment (Concl. IV, R. 280).

2. Even if the insurance attached, the insurance is void because the PACIFIC QUEEN was sent to sea in an unseaworthy state, with the privity of the owners and managers, in violation of the Marine Insurance Act, 1906, § 39(5). (Concl. V, R. 281-2).

3. Even if the insurance attached, the loss of the PACIFIC QUEEN by explosion is not an agreed peril under the Inchmaree clause because the loss resulted from "want of due diligence by the owners of the vessel, or any of them, or by the managers." (Concl. VI, R. 82, 282).

4. Even if the insurance attached, it was void because the PACIFIC QUEEN transported bulk gasoline in violation of the Tanker Act, 46 USC § 391a.[1] This was a separate and additional violation of the statutory warranty of seaworthiness under § 39(5) of the Marine Insurance Act; and was also an independent "want of due diligence" by the owners and managers under the Inchmaree clause.

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[1] Reproduced in full text in Appendix II.

D. Three subsidiary conclusions of the trial court should be affirmed:

1. Hull, Peck and Royer were partners of PQF and their admissions of want of due diligence in sending the PACIFIC QUEEN to sea in an unseaworthy state, and that bulk gasoline aboard the PACIFIC QUEEN was sold and bartered, and were not her "fuel or stores," are binding on PQF.

2. Suit against Buffalo Insurance Company is time barred.

3. Two cases were submitted by both parties for non-jury trial. There is no merit to PQF's contention now raised for the first time that some new right to jury trial arose by voluntarily requesting that their pending State Court case be tried and determined with the Federal Court case already set for trial. In any event, this new contention was never raised, presented to or passed upon by the Trial Court, or by PQF's Statement of Points, on appeal to this Court, or at any time until PQF's Opening Brief, and therefore was not preserved for appeal and should not now be considered by this Court.

VI. ARGUMENT

A. The Judgment of the District Court Must Be Affirmed, or the Appeals Dismissed, Because of PQF's Serious Violations of Rules 17 and 18 of this Court.

1. PQF's Designation of the Record violates this Court's Rule 17, subd. 6, that appellants shall designate:

> " * * * all of the record which is material to the consideration of the appeal * * *."

An inspection of PQF's Designation of the Record[1] shows that PQF designated for printing only fragments of favor-

[1] PQF adopted as its Designation of the Record here, the one which it had filed in the District Court (Original Paper No. 47, R. 318). PQF did not designate this for printing, but it is in this Court's file. See PQF's letter to the Clerk of this Court dated November 10, 1961.

able evidence on disputed issues, and omitted most of the adverse evidence whether adduced on direct or on cross.

For example, PQF's first witness, Mardesich, their managing partner, testified extensively (R. 325-345, 974-1014). One disputed issue is the status of Hull, Peck and Royer as PQF partners (Finding, R. 250; Concl., R. 285; PQF Op. Br. 48-50). Mardesich testified on this issue and he identified federal Income Tax Returns signed by him which reported them as partners (*e.g.* R. 326, 331, 333, *passim* through 345); but PQF designated none of this record. In fact PQF designated from Mardesich's first 20 pages of testimony only the first 8 lines of his direct exaimnation (R. 235) and 4 lines of cross (R. 337). These excerpts deal only with his alleged activities in the "realm of finance and banking," cited above, as illustrative of PQF's misleading "statements" of fact.

Each succeeding designation by PQF is equally a patchwork of favorable snatches of evidence. This is particularly flagrant as to non-disclosure, unseaworthiness, gasoline as the cause of the explosion, and want of due diligence. Compare Appendix V, *infra,* with PQF's Designation of Record for Printing. Such picking and choosing of bits of testimony does not comport with either the spirit or letter of Rule 17, subd. 6. This Court, in *Watson v. Button,* 235 F.(2d) 235, at 238 (CA 9, 1956), recently reaffirmed that:

> "The burden is on (appellant) to show that the trial court's finding was clearly erroneous. An *appellant must include* in the record *all of the evidence* on which the District Court might have based its findings. (Note re F. R. Civ. P. 75 c.) When this is not done, the judgment of the District Court must be affirmed. (Citing cases)"

True, the Underwriter appellees sought to correct the

record by designating at least sufficient portions to illuminate the other side of the coin.[1] But theirs is not the burden. Moreover, if appellants elect to flaunt the rule, appellees are constrained to designate sufficient evidence to show the Findings are not "clearly erroneous," yet, if appellants abandon all fact issues, appellees must keep the record adequately abbreviated under F. R. Civ. P. 75(e). Here Underwriters have by no means designated all the supporting evidence; and they were additionally handicapped because PQF's Specification of Errors fails to identify challenged findings, *infra,* p. 32.

In *Watson, supra,* 235 F.(2d) at 238, note 8, this Court cited with approval *In re Chapman Coal Co.,* 196 F.(2d) 779, 785 (CA 7, 1952). There the Court said:

> "Where, as in this case, there has been a hearing in the District Court in which the parties have participated by their attorneys, where evidence has been heard, and where the District Court has entered an order which would be justified by evidence which might have been induced or agreements which might have been made between the parties in such hearing, the burden is upon the party appealing from such an order to include in the record on appeal a proper transcript of the hearing to show that there was no such evidence or agreement. *All possible presumptions are indulged to sustain the action of the trial court.* It is, *therefore,* elementary that *an appellant seeking reversal* of an order entered by the trial court *must furnish* to the appellate court *a sufficient record* to positively show the alleged error. (Citing cases)
>
> "That was not done by the appellant here. It fol-

[1] Defendant appellees' Designation of Additional Portions of Content of Record for printing dated Nov. 24, 1961, and filed with the Clerk of this Court Nov. 25, 1961.

lows that each of the orders appealed from must be and is

"Affirmed."

It is respectfully submitted that on this ground alone the judgment of the District Court "must be affirmed."

2. Defendants' Opening Brief also violates seriously this Court's Rule 18 subd. 2 (d), which requires that:

> "*In all cases,* when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous."

It has repeatedly been held that this Rule must be observed.

> *Thys Co. v. Anglo California National Bank,* 219 F. (2d) 131, 132 (CA 9, 1955), and cases cited.

PQF's Specification of Errors reads in full text:

> "*Forty-eight alleged errors* on the part of the lower court *have been specified* in our Statement of Points found at Volume I, pp. 297a-297h of the Record. *Of these,* only Nos. 1, 3, 14 and 47 are no longer considered germane to this appeal, and *the rest are incorporated by reference* herein as if fully set forth. In the Argument following hereafter, *many of the specific errors will be consolidated* under certain main points of argument." (PQF Op. Br. p. 11)

Of PQF's 48 Points (R. 297a-h), PQF specifically identifies only one, No. 24 (R. 297(d)), (PQF Op. Br. p. 45).[1]

This clearly violates Rule 18.

The portion of PQF's Brief entitled "Argument" (pp. 16-70) is divided into ten sections. Sections IV and VI are

[1] Underwriters, without prejudice to their contentions that the judgment must be affirmed, or the appeal dismissed, have met Point No. 24 in their following Answer on the merits. (Und. Br. p. —).

each divided into four sub-issues; Section V is divided into two sub-issues. No points, or errors, are specified.

Under the Rule and *Thys, supra,* 219 F.(2d) at 132, this Court has reiterated:

> "Specifications of error which set out more than one error are improper and need not be considered."

In *Everest & Jennings, Inc. v. E. & J. Manufacturing Co.,* 263 F.(2d) 254, 258, (CA 9, 1958, rehearing denied 1959) this Court held that, where appellants cited 26 Specifications of Error in their Statement of Points, but set out in argument only 8 errors, the Appellate Court was relieved of considering the omitted errors, even if they were set forth elsewhere in the record.

While PQF's Statement of Points claimed that nine Findings of Fact were erroneous (R. 297a-c, Nos. 4-13), their Brief (p. 17) "sets out" in argument but one, that:

> "The Court's finding that the destruction of the vessel was the result of a gasoline explosion is clearly erroneous."

And it does not even identify either by number or by record reference what Finding, or which of 48 points, is drawn in issue. All of PQF's remaining Brief purports to challenge unidentified "Conclusions," or "Failures to Conclude." Their argument on these alleged errors is couched in such broad terms that Underwriters can only speculate as to which specific Findings or Conclusions, or portions of the Court's oral opinions are challenged; or which of PQF's Points or Specifications of Error challenge the Findings. It is thus impossible for Underwriters to know "as particularly as may be" what is "alleged to be erroneous."

In *Thys, supra,* 219 F.(2d) at pp. 132-3, this Court held that:

> " * * * in disregard of the Rule, the particular points raised are not stated in full before being discussed, several allegedly erroneous findings of fact are joined under one heading for argument, and there is a failure to state with particularity wherein some of them are thought to be erroneous."

And in *Peck v. Shell Oil Co.,* 142 F.(2d) 141, 143 (CA 9, 1944) this Court held:

> "With respect to many of the 'points' * * * no argument or discussion is presented in their opening brief. Therefore these points are deemed abandoned and need not be considered here. (Citing cases)"

3. A further handicap to this Court's review, or to a concise Answering Brief, arises because PQF has not complied with this Court's Rule 18, subd. 2(f), which requires Appellants' Opening Brief to set out in an appendix "page references to the record where the exhibits were identified, offered and received or rejected as evidence."[1]

> *Brandow v. United States,* 268 F.(2d) 559, 566, (CA 9, 1959).

For example, PQF's brief, p. 14 quotes from an exhibit which under a different number, 440, was rejected as evidence on PQF's own objection. (See, typed transcript of original record, not printed, P. 1508.)

For these serious violations of this Court's Rules, which must seriously impede the Court in a clear understanding of alleged errors, and which have seriously handicapped Underwriters in preparing a comprehensive, yet concise, Answering Brief, it is respectfully submitted that the judgment below must be affirmed, or the appeal dismissed.

> Cf. *Morrison v. Texas Company,* 289 F.(2d) 382 (CA 7, 1961).

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[1] Appellees, to assist the Court, and without prejudice to their contention that the appeal should be dismissed or the judgment affirmed, have supplied the required Table of Exhibits as their Appendix VI.

B. English Law and Usage Governs Determination of the Legal Issues on These Marine Insurance Policies.

The Trial Court, after comprehensive briefing, repeatedly so held (R. 226, 277, 279-280). It should no longer be in doubt. PQF's "Statement of Points" Nos. 3 and 14 (R. 297a, c) had challenged this, but their "Specification of Errors" now abandons them (PQF's Op. Br. 11). Yet PQF's next following paragraph captioned "Statement Concerning the Law Applicable" appears to becloud their concession by quoting out of context restrictive language from an anonymous law review note and by misreading a District Court opinion (PQF Op. Br. 11-12).

At the outset it is essential to affirm the Trial Court's holding that English Law and Usage is applicable here, and not to hedge it.

The law review quotation is out of context because it refers to and cites life insurance cases rather than marine insurance precedents; and because it omits the following sentence from the same paragraph of the note from which PQF quotes (PQF Op. Br. 12).

> "*Express stipulations,* nevertheless, *are given effect,* except perhaps when contrary to an express provision of a statute of the insured's state." 62 *Harv. L. Rev.* at 651 (1949).

Here the Trial Court expressly found:

> "The parties having agreed thereto in the insurance contract, and there being no Washington law precluding such stipulation, the English law and usage provision is valid and controlling." (*Mem. Decision,* September 28, 1960, R. 226).

The proper rule on marine insurance policies in the State of Washington is well summarized in *2 Couch, Cyc. of Ins. Law,* § 16:21, p. 33 (2d ed., 1959) that:

> "A marine policy is to be construed according to English marine insurance laws and customs where the parties have so stipulated in the policy." (Citing *Lecicich v. North River Insurance Co.,* 191 Wash. 305, 71 P.2d 35 (1937)).

The excerpt from *Landry v. Steamship Mutual Underwriting Ass'n.,* 177 F.Supp. 142, at 146 (D. Mass., 1958), states:

> "*However, since there do not seem to be any English authorities which are precisely in point,* the substantive questions must be resolved largely upon general principles of construction which are not different in England from those used in this country." (Emphasis supplied).

PQF reads this to justify them in citing:

> "* * * American cases where it is felt English law has not adequately covered the field in question or where the American law affords a supplementary view." (PQF Op. Br. 12).

But *Landry* does not free PQF to pick and choose at random a "supplementary view" that may support vicarious arguments of PQF's Brief (*e.g.* PQF Op. Br. 13, 25, 29, 31, 32, *passim*). Where English authorities are in point, they are controlling. PQF agrees only when they think a particular English case is helpful. Thus, they cite *Cia. Naviera Vascongada v. British & Foreign Marine Insurance Co., Ltd.* (1936) 54 Ll. L. Rep. 35, which they believe in their favor, and then advise:

> "It is not the role of court to disagree with it as English Law and Usage have been found to govern the contracting parties." (PQF Br. 55).

The Trial Court found that English law is applicable, and that it is to be determined by reference to the Marine Insurance Act, 1906, and to leading marine insurance texts and

cases (R. 277). The sections of the Marine Insurance Act, cited by either side, are reprinted by Underwriters as their Appendix I. They will rely upon its relevant sections and English cases and texts in point, and on American cases in accord.

C. The Insurance Was Void *ab initio* Because of PQF's Failure to Disclose the Material Increases in the Risk Caused by the Increased Gasoline Carrying Capacity of the *Pacific Queen* and the Altered Extra-Hazardous Methods of Carriage and Discharge of that Gasoline.

A. The Marine Insurance Act, 1906, provides:

> "17. A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.
>
> "* * *
>
> "18.—(1) * * * the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.
>
> "(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk." (App. 1, p. 3).

B. The Court's Findings of Fact, quoted above in the Statement of the Case and documented below in Appendix V with record references, where challenged, clearly establish that:

a. PQF increased the bulk gasoline capacity from 3,000 to 8,000 gallons (R. 259).

b. This was a material increase in the risk which was not disclosed to Underwriters (R. 260).

c. An even greater undisclosed increase in the risk was accomplished by making extremely hazardous alterations in the method of discharging gasoline by removing permanent drainage plugs at the bottom of the tanks and inserting discharge valves along a passageway where ship's equipment, fishing gear and personnel frequently passed (R. 260).

d. These changes were made after the 1955 survey and prior to May 24, 1957, the attachment dates of the insurances on the PACIFIC QUEEN (R. 260).

e. These increases in the risk are obvious facts that should have been known to anyone with a minimum of experience or understanding (R. 260).

f. That these changes were increases in the risk was certainly known to the owners of the PACIFIC QUEEN, and virtually admitted by them (R. 260).

g. These altered methods of handling gasoline were not in common usage, but were exclusive to the PACIFIC QUEEN (R. 261):

h. PQF's managing owner, Mardesich, had personal knowledge of these gasoline tank and discharge changes which materially increased the risk (R. 261).

i. Neither he nor any of his other partners disclosed these changed conditions to the Underwriters, or to PQF's brokers or to the surveyors (R. 261-2).

j. Neither surveyor, Marquat, now deceased, who made the survey in 1955, nor Elkins, since retired, who made the survey in 1957, knew of the increased gasoline capacity, or of the unsafe or improper gasoline discharge facilities, and there was nothing observable by any reasonable inspection which would have disclosed these changes. In fact PQF's counsel claims the changes were a "simple job that would not take two men thirty minutes." (R. 262).

k. Both marine surveyors were of the highest ability, character and integrity and would not have overlooked any such great increase in the risk (R. 262-263).

1. Underwriters would not have insured the vessel if PQF or their brokers had disclosed to them any or all of the material increases in the risk (R. 264).

Not one of these Findings of Fact is directly challenged by PQF. It does, apparently, by the body of its argument on nondisclosure, challenge the Finding that there was nothing observable by any reasonable inspection which would have disclosed the changes in question to the surveyors. The references to this Finding in Appendix V show that it is not just amply, but is overwhelmingly, supported by the evidence.

In any event, PQF makes no claim whatsoever that it actually disclosed these changes to the Underwriters, brokers, or surveyors. Nor does it challenge the Findings that they constituted material increases in the risk which would, if disclosed to the Underwriters, have resulted in their failure to secure insurance.

PQF's defenses are based solely on the twin propositions that (a) the changes must be presumed to have been known to the insurers, although not actually known by them, and (b) that disclosure of the changes was waived.

These exceptions to the duty of disclosure are set forth in §18(3) of the Marine Insurance Act, 1906, as follows:

> "In the absence of inquiry the following circumstances need not be disclosed, namely: * * *
>
> "(b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;
>
> "(c) Any circumstance as to which information is waived by the insurer * * * . "

A full discussion of these exceptions to the duty of dis-

closure will be found in Arnould on Marine Insurance, 15th Ed. (1961), §§621-631.

In summary, Arnould states, on the exception dealing with circumstances presumed to be known to the insurer, that:

> " * * * an insurer is presumed to know that it is impossible to make a floating dry-dock as seaworthy as an ordinary ocean-going craft, and is put on inquiry, if he admits seaworthiness, as to the means adopted to strengthen it.
>
> "A knowledge of the political state of the world, of the allegiance of particular countries, of their standing mercantile regulations, of the risk and embarrassment affecting the course of trade contemplated by the insurance, must all necessarily be imputed to the Underwriter, and therefore need not be disclosed by the assured * * * . " (Arnould *supra* §622).

It is not seriously contended by PQF that it was entitled to the benefit of this exception to the duty of disclosure in the case of its carriage of gasoline and methods of stowage, handling and dispensing of same.

On the subject of what ought to be known to an insurer, Arnould goes on to state:

> "On the principle that the assured need not disclose what the Underwriter ought to know, it has been decided in several cases that facts comprised in the general usages of trade need not be communicated to the Underwriter; * * *. But to dispense with communication of anything done according to usage, such usage must be generally and universally known to all engaged in the trade." (Arnould *supra* §623).

Not only was the PACIFIC QUEEN's altered method of handling gasoline not a usage "generally and universally known to all engaged in the trade," but, on the contrary, PQF does not challenge the Finding that it was "not in

common usage, but was exclusive to the PACIFIC QUEEN" (R. 261, *supra,* p. 11). Thus the exception to the duty to disclose in §18(3) and (4), relied on by PQF's Brief, p. 30 ff. based on usage, is clearly not available to PQF.

As to the final exception to the duty to disclose, waiver, Arnould states, in §631, p. 597.

> "It was * * * held by the Court of Appeals [in *Mann, MacNeal & Steeves v. Capital & Counties Ins. Co.*] that information that the cargo was of a hazardous character had been waived. Bankes L. J. said that an Underwriter waives any information in relation to what may be fairly described as a parcel of ordinary cargo of lawful merchandise, and also, quoting Lord Esher M. R. in *Asfar v. Blundell* that the rule is satisfied if the assured discloses sufficient to call the attention of the Underwriters so that they can see if they require further information, they ought to ask for it. * * * "

PQF rely heavily upon *Mann, MacNeal & Steeves v. Capital & Counties Ins. Co.* (1921) 2 KB 300. Underwriters do not quarrel with the holding in this case at all, the heart of which is that the rule of disclosure

> "* * * is satisfied if he (the owner) discloses *sufficient to call the attention of the underwriters in such a manner that they can see that if they require further information* they ought to ask for it."

In that case, at p. 306, the Court found under the facts of that case:

> "Petrol contained in iron drums was *proved* to be quite an ordinary and common form of merchandise * * *."

The reason petrol was safe under the facts of *Mann* was explained in a concurring opinion at pages 316-17:

> "* * * (T)he drums containing the gasoline are substantial things, *welded* and not riveted, and *strengthened* against crushing by stiff rims, with the hole for

> filling fitted with a screw cap, and jointed and *tightened up* so that no gasoline can leak out * * * in my view, in this connection it was probably less and certainly not more dangerous than were the claret staves (for wine)."

And, at page 307:

> "* * * Whether disclosure must be made or not is one of degree, *depending upon the circumstances of each particular case * * * the broker must keep himself posted * * * and he must have sufficient information * * * to decide what disclosure he should make * * *."

And at page 311, the Court similarly held:

> "*Marine insurances* are affected in ordinary course by agents, insurance *brokers,* whose *knowledge and duty to disclose is in substance coextensive with that of their principals.*"

Thus, the true point made in the *Mann* case is that the disclosure of the nature of the cargo is waived where the cargo is an ordinary and common form of merchandise which can be carried as safely as the common run of cargo. It gives no support to PQF's assertion that disclosure of a unique and extraordinarily dangerous system of handling gasoline is waived by the failure of a surveyor to inquire about it stemming from his ignorance of its existence which existence was not observable by reasonable inspection.

> " 'I can conceive that, if an Underwriter is told: "I propose to ship pyralin," and does not ask: "What on earth is that?," he waives the disclosure to him of the ordinary qualities of pyralin. But, if any particular shipment of pyralin has some peculiar quality which would not ordinarily follow from or be disclosed by saying "This is pyralin," it seems to me that that is clearly a matter which ought to be disclosed.' " Arnould, *supra,* §631.

Here waiver is asserted, apparently, by reason of the fact of a survey. But PQF does not challenge the Findings that

they did not disclose the altered method of handling gasoline to the surveyors, that the surveyors did not know of these alterations, that the altered methods were exclusive to the PACIFIC QUEEN, that they were a simple job that would not take two men thirty minutes. And PQF cite no evidence for their apparent contention that the Finding that the alterations were not observable by reasonable inspection was clearly erroneous, a Finding supported by the overwhelming preponderance of the evidence cited for it in Appendix V to this Brief.

How Underwriters could have waived knowledge of a material increase in the risk, due to alterations not observable by a surveyor on reasonable inspection, is not explained by PQF in its Brief.

Whether deliberately misled or otherwise, insurers are not chargeable with knowledge where the surveyor is uninformed or misinformed. In *Leathem Smith Putnam Navigation Co. v. National Union Fire Ins. Co.*, 96 F.2d 923, (CA 7, 1938) the Court upheld the District Court's findings:

> "*The writing of the insurance policies was based largely on the report* of one Walker, *a surveyor, whose report the insurance companies agreed to accept.* * * * *Libelants'* (*owners'*) *agent* Walker, *a surveyor, made misstatements* of fact to the underwriters * * *. *Insurers were not estopped by reason of failure to make further inquiry,* after reading the Walker report *which contained misstatements material to the risk.* * * * *Consequently* * * * *there was no meeting of minds* in an agreement *for insurance on a vessel which was unseaworthy because* * * * (*of a violation of Coast Guard requirements*)."[1]
>
> "Appellees (*underwriters*) *are not estopped* by

[1] Actually of the "Board of Supervising Inspectors" who at the time were statutory predecessors of the "Coast Guard" in performing this inspection function.

> Walker's report; *there was no waiver* of compliance with government rules * * * . *The underwriters had the right to believe that the owners of the vessel had complied with the law.''*

The full text of the lower and appellate court opinions are precisely in point here and are particularly invited to the Court's attention.

Continuing, the Seventh Circuit said:

> *''The concealment of material facts exists, even though not intentional. It creates a state of facts that prevents* consummation of an agreement by *a meeting of minds* upon agreed facts * * *.''

This District Court decision, *sub. nom.* The *Material Service,* 1937 AMC 925 was later cited with approval by this Court in: *The Denali,* 112 F.(2d), 953, 956 (CA 9, 1940).

Similarly, in *Porter v. Bank Line,* 17 F.2d 513, 518, (D.C. Va. 1927), the Court considered a survey and said:

> ''* * * *the conclusion* I have reached *is based largely upon* * * * *failure of the owner's representative* * * * *to disclose* fully *to the* Lloyd's representative (*surveyor*) the events of the voyage, together with *the conditions* that * * * (*created*) an *unseaworthy condition.''*

Cf. *Sun Mutual Insurance Company v. Ocean Insurance Company,* 107 U.S. 485 at 505 (1882);

Chicago S.S. Line v. U.S. Lloyds, 12 F.2d 733 (CA 7, 1926); cert. den. 273 U.S. 698 (1926).

It is equally well settled under English law and usage requiring highest good faith that there must be full disclosure:

> *Marine Insurance Act* 1906, §§17 through 20, quoted in *2 Arnould Marine Insurance* (15th Ed. 1961) pp. 1264-65)

The duty to advise the surveyor is italicized by the recent

decision of this Court in *States Steamship Company v. United States,* on rehearing. 259 F.2d 458, 469 (CA 9, 1958). In that case, the Court said:

> "Marine *Surveyor* Wilson *who* then *inspected* the ship for the American Bureau of Shipping testified that he *received no special information concerning the vessel prior to his survey,* and he *knew nothing outstanding against it. * * * The Company itself was chargeable with knowledge* of the pending inspection and *yet it failed through* (its port engineer, and *its manager*) or any other person *to inform the inspectors* of the special conditions attending the ship. In the words used in the *Silver Palm* [*Ninth Circuit,* 94 Fed.(2d) 776] *supra, all these circumstances 'made the more imperative the obligation of the owner and operator to advise' of the special circumstances calling for a special inspection* and a more thorough one than had been given."

In a very recent British case, *The Assunzione,* [1956] 2 Ll. L. Rep. 468, at 486, the Court said:

> "*A prudent shipowner has a superintendent* whose duty it is in the first instance *to go around the vessel finding out the defects, and pointing them out to the Classification Surveyor. A superintendent does not rely on the* classification *surveyor to point out the defects*— at least *it is not good practice* to do so. *The superintendent and the classification surveyor should inspect together and deliberate on what should be done.*"

Thus, under English law and usage, plaintiffs failed to make the requisite full disclosure either to the surveyor employed by Hansen & Rowland or to their own broker, Hansen & Rowland, or to the defendant Underwriters.

Cf. *Porter v. Bank Line,* 17 F.2d 513, 518 (D.C. Va. 1927) reviewing many American and English cases and holding the

> "*failure* of the owner's representative * * * to *disclose fully to Lloyd's representative*"

was the prime reason for a vessel sailing in an unseaworthy condition.

For all of the foregoing reasons, it is submitted that PQF's gesture of asking a surveyor to inspect an unlighted dead ship incident to a primary request to look at some new gillnet boats and incidentally to take a "look" at the PACIFIC QUEEN, and failing to have any owner point out hazards, or advise him of intended changes, or even to have one of the owners who was chief engineer identify himself, or to inform the brokers of present or intended changes, does not fulfill the requirements of *uberrimae fidei* and fair disclosure to Underwriters under either English or American law.

The insurance never attached and was void *ad initio* for failure to disclose material increases in the risks.

D. The Insurance Was Void Because the *Pacific Queen* Was Repeatedly Sent to Sea in an Unseaworthy State with the Privity of the Assured in Violation of Section 39(5) of the Marine Insurance Act, 1906

PQF's Opening Brief, pp. 40-45, does not challenge the Court's Findings (R. 265-8) *supra,* 13-16, of "unseaworthiness," but presents two law questions—the meaning of the terms "*sent to sea*" and of "*privity*" (PQF Op. Br. pp. 41, 43).

The test of seaworthiness under § 39(5) of the Marine Insurance Act, 1906 (App. I, p. 7) is very clear and simple:

> "In a time policy there is no implied warranty that the ship shall be seaworthy *at any stage* of the adventure, but where, *with the privity of the assured* the ship is *sent to sea* in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness."

Since PQF accepts the Court's Finding that the PACIFIC QUEEN was unseaworthy when she was sent to sea in May, 1957, with 8,000 gallons of gasoline aboard and the hazardous discharge system described above, it confesses breach of § 39(5), for the Court found that:

> "Her *continuous* unseaworthiness until her fatal explosion was a proximate cause of her loss." (R. 268)

This encompasses the finding that:

> "The PACIFIC QUEEN was unseaworthy each time she was sent to sea on and after May 24, 1957 * * *. (She) was unseaworthy when she left for her 1957 voyage by reason of the hazardous conditions caused by the increased gasoline carrying capacity and, to an even greater extent, by the changed method of piping, valving, and internal methods of discharge of gasoline. This system was grossly unsafe and improper and created a great and serious hazard to life and property. The owners were privy to this unseaworthiness, and knew of these conditions and neglected to take reasonable precautions to correct these deficiencies and to make her seaworthy." (Finding XI, R. 264-5)

The Court concluded that the vessel was sent to sea in an unseaworthy state with the privity of the owners and manager, citing English and American authorities (R. 281-2).

There is no dispute or challenge to Mardesich's participation in authorizing the loading of 8,000 gallons of gasoline, or the hazardous bottom-drainage system. Clearly he was privy to this. Therefore, on this independent ground, the insurance is void under § 39(5).

As Arnould, 15th Ed. § 706, p. 669, states:

> "It is not necessary, (under 39(5) of the Marine Insurance Act) in order to exonerate the insurer from liability, that the unseaworthiness should be the sole

cause of the loss; it is sufficient that the unseaworthiness was a proximate cause of the loss." Citing:

M. Thomas & Son Shipping Co. v. London & Provincial Mar. Ins. Co., (1914) 29 T.L.R. 736; 30 T.L.R. 595 (C.A.);

Cohen v. Standard Mar. Ins. Co. (1925) 30 Com. Cas. 139.

PQF's challenge, both as to the terms "sent to sea" and "privity," applies *only* to the additional unseaworthiness on subsequent stages of its 1957 career, particularly those following the Friday Harbor gasoline spill.

These succeeding "stages" are cumulatively important. When the vessel returned from Alaska, she discharged at Seattle docks. Then she started a second stage, and reentered operating status in the same unseaworthy condition, sailing to Friday Harbor. Her original 3-months operating hull insurance had expired August 24, 1957 (R. 76). PQF agrees that:

> " * * an additional 30-day period of insurance coverage was obtained on September 5th (R. 84) in order to ensure (*sic*) operating insurance during a period when the PACIFIC QUEEN would be broken out of lay-up status * * * (PQF Br. 6)."

This new 30-day period effective September 5, 1957, was the date she entered a second stage and "sailed for Friday Harbor" (R. 85).

At the same time PQF owners, Mardesich and Vilicich, knew and hence were "privy" not only to her original hazardous and unseaworthy condition, as she was still carrying 2,000 gallons of bulk gasoline in her tanks, but they also then knew in addition that in August 1957 the Coast Guard charged a similar vessel, the ALASKA REEFER, in which Vilicich also owned an interest, with violating the Tanker

Act (46 USC § 391(a)) by transporting bulk gasoline without a requisite Coast Guard inspection and certificate (R. 274-5; *supra* 20).

Was the PACIFIC QUEEN "sent to sea" from Seattle to Friday Harbor? The trip took 7 hours (R. 1169). She could make up to 12 knots (R. 1425-6). The Court can take judicial notice that the distance is about 70 miles, which is far greater, for example, than the 20-25 mile width of the English Channel or the North Channel of the Irish Sea. The waters of Puget Sound can be notoriously rough, and occasionally sufficient to founder great vessels. Cf. *The President Madison,* 91 F.(2d) 935, (CA 9, 1937).

PQF would now define "sent to sea" by "Pilot Rules for Inland Waters," 33 CFR Part 80, which are filed under 33 USC § 151, to inform navigators of where the Inland Rules of navigation and the International Rules respectively apply.

> *U. S. v. Newark Meadows Imp. Co.,* 173 Fed. 426, C.C.N.Y., 1909.

These rules relate to navigational signals, lights, etc., in America and have no relation to the words "sent to sea" in the English Marine Insurance Act.

In *New York, New Haven & Hartford R.R. v. Gray,* 240 F.(2d) 460, at 466 (CA 2, 1957), the Court assumed, arguendo, that under § 39(5) of the Marine Insurance Act a "busy car float" was "sent to sea" each time it left its moorings in New York harbor.

Mississippi Shipping Co. v. Zander & Co., 270 F.(2d) 345, 349 (CA 5, 1959) held the words mean "when the ship breaks ground for the purpose of departure."

Section 39(5) applies by its terms to "any stage" in which a vessel is "*sent to sea*" in an unseaworthy condition

with the privity of the owners. The English cases recognize successive stages in a time policy from port to port.

> Cf. *Ashworth v. General Accident Fire Assurance Co.* [1955] I. R. 268, 289, 292.

The Trial Court Finding XI, *supra* 13 ff., and its Conclusion (R. 281) that the vessel was repeatedly "sent to sea" is correct.

Was this "with the privity of the assured"? PQF relies on *Cia. Naviera Vascongada v. British & Foreign Marine Insurance Co., Ltd.* (1936) 54 Ll. L. Rep. 35. They contend that there is no privity unless Mr. Mardesich deliberately refrained from an examination which might have revealed that gasoline must have soaked and impregnated large parts of the wooden area of the ship and that the omission of PQF to take precautions beyond washing down the affected areas and the employment of blowers cannot make the owners privy to any unseaworthiness which resulted from this inadequate response to the challenge posed by the gasoline spill (PQF Br. 43 ff.).

As noted above, PQF's only challenge to "privity" is restricted to the stages of PACIFIC QUEEN's career after the gasoline spill. PQF concede privity to the independent unseaworthiness caused by the increased gasoline carried under the extraordinarily hazardous conditions found by the Court and in violation of the Tanker Act, and thus, in effect, confess to the correctness of the Trial Court's judgment (Finding IX, X, *supra*, 9, 11).

The gist of the English trial court's holding in *Vascongada* is at pp. 57-8:

> "I have held that the GLORIA was unseaworthy when she left Larne [a port on the Irish sea. The condition causing the unseaworthiness occurred as the vessel was leaving that port]. Were the plaintiffs privy to her so

doing? To prove that they were the defendants must establish privity in someone in authority in the plaintiff company. That person in the present case is Mr. Zubizaretta, who was in charge of the engineering side of the plaintiff company's business, [and who was, at all times material, located *in Bilbao, Spain*]. * * * It is contended by * * * the plaintiffs, that actual knowledge of the unseaworthiness to which the loss is attributable, must be proved. * * *

"[Defendant] contends that when there has been a deliberate omission to have the ship surveyed when according to the rules of her Society a survey is due, where the age of the ship is such that her owners must have realized that only regular surveys could obviate the risk of her going to sea in an unseaworthy condition, the owners are privy to any unseaworthiness, which the survey, if held, would presumably have discovered, * * * I think that if it were shown that an owner had reason to believe that his ship was in fact unseaworthy, and deliberately refrained from an examination which would have turned his belief into knowledge, he might properly be held privy to the unseaworthiness of his ship. But the mere omission to take precautions against the possibility of the ship being unseaworthy cannot, I think, make the owner privy to any unseaworthiness which such precaution might have disclosed."

This is not applicable to the PACIFIC QUEEN except that it confirms that § 39(5) applies "at any stage." In *Vascongada,* the owner was a thousand miles away in Spain when an accident causing unseaworthiness took place on the Irish Sea. He did not even learn of it until after the loss of the vessel. But, in the PACIFIC QUEEN, the owners caused the original and continuing unseaworthiness by their own acts and, before the second stage, from Seattle to Friday Harbor, the owners knew Coast Guard inspection was required; and before the third stage from Friday Harbor to Seattle,

the managing owner traveled to Friday Harbor and knew on the day it happened that an extraordinarily serious further unseaworthiness resulted from a 600-gallon gasoline spill. He inspected it, treated it as "almost trivial" (R. 240), gave no orders relating to the inadequate clean-up or toward preventing further gasoline spills, and failed to exercise due diligence to render his vessel seaworthy (Finding XIII, R. 272-3; *supra* 19).

The PACIFIC QUEEN case is much closer to a case affirmed by the Court of Appeals, *Lennard's Carrying Co. v. Asiatic Petroleum Co.*, 1914 KB 419; aff'd. 1915 AC 705. There the question was whether a loss had happened without "actual fault or privity" under the applicable English statute. The parallels to PACIFIC QUEEN are striking. A cargo of benzine on board ship was lost by a fire caused by unseaworthiness of the ship due to defective boilers. The owners were one limited company. The managing owners were another such company. The managing director of the latter company was a registered managing owner and took the active management of the ship on behalf of the owners. He knew, or had the means of knowing, the defective condition of the boilers, but he gave no special instructions to the captain or chief engineer regarding their supervision and took no steps to prevent the ship putting to sea with her boilers in an unseaworthy condition. The lower court's opinion reads, in relevant part, as follows at 1914 KB 419, 440:

> "A mere examination of the deck log * * * would * * * have been useful in shewing whether steam power was failing and therefore leakage increasing. Careless the engineers might be, but I see no reason why they should keep such things out of the log * * *. It is true that the learned Judge found, and justly found, that the chief engineer was a lying witness, though to be sure the man lied on his oath to promote, as he

thought, his master's interests * * *. If the managers had used these sources of information, which they unjustifiably neglected, they would have learned, and learned in time, how much worse the condition of the boilers was. * * * I recall that with proper diligence, the owners might have prevented all of this and must have known the special perils attending the transport of benzine in bulk, for it was their trade. When these owners ask this Court to find that the fire, which naturally ensued in the circumstances, 'happened without their actual fault or privity,' I refuse."

The Court of Appeals affirmed, holding the owners had failed to discharge their burden of proving that the loss happened without their actual fault or privity" [1915] A.C. 705.

Closer still to the facts in the PACIFIC QUEEN, and also arising under the Marine Insurance Act, 1906, § 39(5), is *Ashworth v. General Accident, etc. Assurance Corporation* [1955] I.R. 268. In that case the vessel also operated in successive stages. She left her final port in an unseaworthy condition, with the owner having full knowledge of a condition which both courts found rendered her unseaworthy. To the owners' claim that she was not sent to sea "with the privity of the assured," the trial court stated, at [1955] I.R. 268, 279:

"Captain Ashworth was, I am satisfied, fully aware of the ship's condition * * *. If he did not actually give orders to [leave port], he certainly did nothing to prevent that from happening. He was, in my view, clearly privy to her leaving Arclo in the condition in which she did leave it. * * * I have found that she was then unseaworthy. In my opinion, it is unnecessary to inquire any further into Captain Ashworth's state of mind. I do not think I have to determine whether he posed himself, and answered in the affirmative, the question: Is the ship unseaworthy? He had all the materials neces-

> sary to form a judgment. He was privy to the state of things which rendered the ship unseaworthy and he was privy to her going to sea in that state."

Despite this holding, the Trial Court found in favor of insured on another issue, but the Supreme Court of Ireland reversed, two to one, in favor of Underwriters. The Chief Justice held at [1955] I.R. 268, 287:

> " * * * Captain Ashworth was well aware of the condition of ship when she left Wexford. He was, furthermore, aware of the defects which developed upon the journey and the causes which compelled her to put in to Arclo. The repair which he directed to be done to the engine could at least have put her in the same condition as that in which she left Wexford. He must have known that he was taking a very great risk in allowing the ship again to sea in that state. Although it may not be necessary to concern oneself with the state of his mind beyond finding that he was aware of the defects which made his vessel unseaworthy, it seems very difficult to avoid the conclusion that he must have known that he was sending his ship out, to use the terms of the definition cited, in such a state that she was not 'reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.' "

The second Justice for the majority stated, on this subject, at [1955] I.R. 268, 291:

> "The respondent was in Arclo * * * and I see no reason for questioning the validity of the trial Judge's finding that he was at that time fully aware of the condition of the ship. * * * he did nothing to repair the serious leakage in the ship nor did he do anything to supply an auxiliary means of pumping should the port engine fail. In all these circumstances I am of the opinion that the ship left Arclo in an unseaworthy condition with the privity of the assured."

The entire question is summed up in *M. Thomas & Son*

Shipping Co. (Ltd.) v. The London and Provincial Marine and General Insurance Co. (Ltd.), (1914) 30 T.L.R. 595, at p. 596, as follows:

> " * * * words in s. 39, sub-s5, of the Marine Insurance Act, 1906, 'Where with the privity of the assured a ship is sent to sea in an unseaworthy state,' meant where the owner was privy to the state of things which in fact rendered the ship unseaworthy."

Cf. *Petition of Boat Demand*, 160 F.Supp. 833 (D. Mass. 1958).

It is submitted on the facts as found and on applicable law the insurance is void under § 39(5) of the Marine Insurance Act, 1906, because the PACIFIC QUEEN was repeatedly sent to sea from the beginning of 1957 until her final tragic explosion in an unseaworthy condition with the privity of the assured.

E. The Loss of the *Pacific Queen* by Explosion Is not an Agreed Peril Under the Inchmaree Clause Because the Loss Resulted from Want of Due Diligence by the Owners of the Vessel, or Any of Them, or by the Managers

PQF's Brief, p. 26, accepts *arguendo* the facts on the Inchmaree defense found by the Court's Oral Opinion (Br. 26-7). We must assume PQF similarly accepts *arguendo* the Court's Findings XII and XIII on this defense. Therefore, as this Court held in its most recent Inchmaree decision, *Founders Insurance Company v. Rogers*, 281 F.(2d) 332 (CA 9, 1960):

> " * * * the issues presented for our review are the narrow ones of the sufficiency of proof to support the findings of fact and the conclusions of law * * * under the insurance contract."

"The sufficiency of proof to support" each sentence of Findings XII and XIII is fully annotated in Appendix V, pp. 33-38. Those findings establish amongst others that the

Pacific Queen was destroyed by a gasoline explosion and not by fire (R. 269), that there was no credible evidence of arson (R. 269), that no pre-existing fire existed (R. 269), that the possibility it was an ammonia explosion is remote (R. 270), and that there was a want of due diligence by the owners and manager (R. 272-274).

Under these established facts, judgment for Underwriters must be affirmed because the general perils clause does not apply to explosions. *Arnould, supra* (15th ed.) § 819, p. 775.

The general perils clause does include the word "fire," but the Pacific Queen was destroyed by an explosion, and not by fire (Finding XII, R. 269, *supra*, 16, 17). The term "fire" does not include an explosion. In *Arnould supra,* (15th ed.) ch. 23 analyzing "Losses by the Perils Insured Against," his commentary on "fire" § 819, p. 775, states:

> "a loss by explosion of steam is not, however, within the general words"

of "perils of the sea," citing the famous case which gave the Inchmaree clause its name, *Thames & Mersey Mar. Ins. Co. v. Hamilton* [1887], 12 App. Cas. 484, 500.

There is no distinction in principle between a loss by explosion of steam, or of gasoline, or of ammonia. As stated in *Eldridge, Marine Policies* (2nd Ed., London, 1924) pp. 146-7:

> "* * * in the case of the Inchmaree (where the question went to the House of Lords), the damage [by explosion] had been caused by a check-valve becoming choked with salt, and as a result the donkey-pump was damaged.
>
> "It was held that *there was no distinction in principle* between that case and the case of [an explosion of steam] and that the underwriters could not be held liable, as the loss had not been caused by any of the perils set out in the policy, nor by perils *ejusdem gen-*

eris, so as to come within the general words * * * (*Thames and Mersey Mar. Ins. Co. Ltd. v. Hamilton,* 12 App. Cas. 484)."

As a result, marine insurance coverage was broadened by the addition of the Inchmaree clause. Eldridge, *supra,* p. 146, *Saskatchewan Government Ins. Office v. Spot Pack,* 242 F.(2d) 385, 391 (CA 5, 1957). It reads:

"This insurance also specially to cover (subject to the free of average warranty) loss of or damage to hull or machinery directly caused by the following:—

Accidents in loading, discharging or handling cargo, or in bunkering or in taking in fuel.

Explosions on shipboard or elsewhere.

Bursting of boilers, breakage of shafts or any latent defect in the machinery or hull (excluding, however, the cost and expense of repairing or renewing the defective part).

Negligence of Master, Mariners, Engineers or Pilots. [P]rovided such loss or damage has not resulted from want of due diligence by the Owners of the Vessel, or any of them, or by the Managers.

Masters, Mates, Engineers, Pilot or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the Vessel." (R. 82)

Dover, Analysis of Marine and Other Insurance Clauses —(London, 1950) summarizes established English Law and Usage at pp. 33-4:

"*The* (INCHMAREE) *clause does not remove from the owners* of the vessel *or* from their *managers* the obligation to *exercise due diligence; if any loss* or damages within the clause *results from lack of such due diligence, the insurers are not liable therefor.*"

Cf. *Founders Insurance Company v. Rogers,* 281 F.2d 332 (CA 9, 1960);

Read v. Agricultural Ins. Co., 1935, 219 Wis. 580, 263 N.W. 632 (1935);

Wigle v. Aetna Casualty & Surety Co., 177 F.Supp. 932 (ED Mich, 1959);

Baggaley v. Aetna Ins. Co., 111 F.2d 134 (CA 7, 1940).

PQF's Opening Brief cites no contrary cases or authorities, British or American, on Inchmaree. They cite

Saskatchewan Government Ins. Office v. Spot Pack, supra, and

Templeman, Marine Insurance (1948)

for the proposition that the Inchmaree clause broadens coverage to include a variety of risks not embraced in the general perils of the sea clause. Underwriters agree, but such generalities do not alter the established facts, or applicable law here.

Templeman, supra, 318, citing *Hutchins Bros. v. Royal Exchange Assce. Corpn.* (1911) 2 K.B. 398, states:

> "*To hold that this 'Inchmaree Clause' covered* the cost of that (loss) *would* be to *make it not* an *insurance* clause *but* a *guarantee* clause, a warranty that the hull and the machinery were free from latent defects * * *."

He also points out that coverage broader than Inchmaree is available if an owner wishes to pay for it.

Next, PQF cites *Vascongada.* It was not an Inchmaree case but a § 39(5) unseaworthiness case, which was distinguished above, pp. 36, *passim.*

Lastly *Tropical Marine Products v. Birmingham Fire Ins. Co.,* 247 F.2d 116 (CA 5, 1957) is cited. The key to *Tropical,* under Inchmaree, is similar on its facts to *Vascongada* under § 39(5). The Court found at pp. 120-1, that the defect, giving rise to an Inchmaree claim was:

> "not *known* or *discoverable* by the owner or one in privity with him."

because:

> " * * * the owner was in the United States and on this record all was left to the master. *There is no evidence that the non-resident owner had personal knowledge of this condition* * * *."

and hence there was no want of due diligence. This is in sharp contrast with the findings here. The Court expressly found there was "want of due diligence by the owners and manager" (Finding XIII, *supra*). The gasoline defects were both "known and discoverable" by PQF's owners including Mardesich, also its manager, who was on the job and had "personal knowledge of this condition." Such "want of due diligence by the owners, or managers" bars recovery under the Inchmaree clause.

Cf. *Chicago Steamship Lines v. United States Lloyds*, 2 F.2d 767 (ND Ill. 1924) aff'd 12 F.2d 733 (CA 7, 1926), cert. den. 273 U.S. 698 (1926);

Leathem Smith-Putnam Nav. Co. v. National U.F. Ins. Co., 1937 AMC 925 (ED Wis. 1937) aff'd 96 F.2d 923 (CA 7, 1938).

Nor is § 55(2) pertinent here for its key is liability for "a peril insured against." And, as shown above, except as contained in the Inchmaree clause, explosions are not such a peril. Thus due diligence by the owner is an express condition to recovery under Inchmaree.

Therefore the judgment must be affirmed on the independent grounds of Inchmaree.

F. Even if the Insurance Attached, it was Void Because the PACIFIC QUEEN Transported Bulk Gasoline in Violation of the Tanker Act. This was a Separate and Additional Violation of §39(5) of the Marine Insurance Act and was also an Independent Want of Due Diligence by the Owners and Managers under the Inchmaree Clause.

The Tanker Act provides in 46 USC §391a:

> "ALL vessels, regardless of tonnage, size, or manner of propulsion * * * that shall have on board any inflammable or combustible liquid cargo in bulk, * * * shall be considered steam vessels for the purposes of Title 52 of the Revised Statutes and shall be subject to the provisions thereof: * * *."[4]

The Court held that the statute:

> "* * * in the most sweeping terms of which the English language is capable, makes it plain that the carriage of bulk gasoline, other than as the vessel's 'fuel or stores,' is unlawful unless the provisions of the Act are complied with, which plaintiffs admit was not done. A fishing vessel, however, large or small, must comply with the Tanker Act if it carries bulk gasoline except as its 'fuel or stores'." (Concl. VII, R. 283)

This conclusion is abundantly supported by the statute's use of the word "all," its legislative history and court decisions:

> "We need not, however, go beyond the use of the word 'all.' It covers everything."
>
> *New Jersey Zinc Co. v. Singmaster* (DCNY 1933) 4 F.Supp. 967, 972; modified on other grounds, 71 F.2d 277 (CA-2, 1934).

"All" is the most "comprehensive word * * * in the English language":

> *Moore v. Virginia Fire & Marine Insurance Company* (Va. 1877) 28 Grat. 508, 516, 26 Am. Rep. 373;
>
> *Seattle v. Hindeley,* 40 Wash. 468, 470, 82 Pac. 747 (1905);
>
> *Travelers Insurance Co. v. Cimarron Insurance Co.,* 196 F.Supp. 681, 682, D.C. Ore. (1961).

Cf. *Baltimore & Ohio R. Co. v. Jackson,* 353 U.S. 325, 330-1 (1957).

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[4] Appendix II contains its full text.

The legislative history[1] of the Tanker Act confirms the Congressional intent to safeguard life and property in carrying bulk gasoline by requiring Coast Guard inspection and approval of all such vessels.

In hearings on H.R. 12840 before House Committee on Merchant Marine and Fisheries (74th Cong.) of May 29, 1936, which became 46 USC §391a, the Director of Steamboat Inspection sought to reduce the hazards of:

> "the ever-increasing transportation of gasoline by small cargo vessels and barges by subjecting them to inspection and regulation to prevent explosion and fires."

Prior Hearings[2] referred to the "great loss of life and terrible menace to tranportation systems that surround them" (p. 49) and to bursting of "discharge hoses" or "flexible tubing" (pp. 50, 52) and hazards of installing concealed pipe connections and the dangers of wooden hulls and to the government's purpose to:

> "Compel fishing vessels to come under regulation." (p. 70)

Cf. *Kelly v. Washington,* 302 U.S. 1, 6, 8 (1949)

Under its 1957 Joint Venture Agreement PACIFIC QUEEN carried in excess of 50% of its bulk gasoline as cargo for gillnet boats which had no relation to her, and also sold part of this bulk gasoline to independent fishermen in Alaska. (Op. R. 247; Finding XV, R. 275-6) Gasoline was thus transported in bulk as cargo.

Phile v. The Anna, 1 Dall. 216, 226, Ct. Com. Pl. Phila. Co. (1 U.S. 1787);

U. S. v. Ketchikan Mchts. Charter Asso., (D.C. Wash. WD.), 1959 AMC 2085, 2090-1.

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[1] Cf. *Baltimore & O. R. Co. v. Jackson, supra,* 353 U.S. at 333.

[2] *House Committee on Merchant Marine and Fisheries* on *Safety of Life and Property at Sea,* 74th Cong. 1st Sess., Part 1, Revision of Inspection Laws, March 6, 7, 8, 13, and 15, 1935.

PQF asserts (Br. 47) that this was "encouraged by all departments of the government in order to assist Alaska in obtaining some sort of balanced economy." Not one word in the record supports such an assertion. No branch of the government encourages law violation. Long before the fatal explosion of the PACIFIC QUEEN in 1957, the U. S. Coast Guard Officer in Juneau, Alaska, addressed a mimeographed letter to all concerned in the petroleum, fishing and bulk carriage field, reading in part:

> "In early September 1956 a tally scow caught fire and burned fiercely for many hours. The tally man lost his life in the fire.
>
> " 'Subsequent investigation revealed that approximately 1,000 gallons of fuel were carried on board the scow. It is obvious that this quantity is in excess of the needs of a nonselfpropelled vessel, and the conclusion is that oil was dispensed to fishing boats * * * It is felt that owners and operators of such scows should be cautioned with *any vessel* regardless of tonnage * * * *which transports bulk petroleum must* first *be inspected and* must *have on board a certificate of inspection.*" (R. 1287).

Further warnings followed (R. 1287-1295). PQF's Exs. 25 and 26 enumerate PACIFIC QUEEN's violations of pertinent Coast Guard regulations.

On August 15, 1957, a month before the fatal explosion, the Coast Guard Officer boarded the M/V ALASKA REEFER and advised Mr. Vilicich that they would cite him for violation of regulations (R. 1283-4).

The Coast Guard found as to PACIFIC QUEEN:

> "That the exception in the Tanker Act for vessels carrying stores is not applicable if gasoline is transported for and dispensed to boats not carried by the mother ship, even though owned by the same owner as the mother ship, and particularly so when sold to inde-

pendent small fishing boats. Such gasoline, *pro tanto,* does not constitute stores. Even if it should be held to constitute stores * * * the exception * * * would relegate the (PACIFIC QUEEN) to the operation of the Dangerous Cargo Act, since she is in excess of 500 tons." (R. 1092)

The PACIFIC QUEEN's operations in 1957 were illegal *ab initio* for failure to comply with the Tanker Act, although it should be noted that the Trial Court's Conclusions did not go this far. Discharge valves on the bottom of interior bulk gasoline tanks were forbidden under Coast Guard regulations (R. 1270).

PQF knew that they were violating Coast Guard regulations. In August 1957, almost a month before the casualty, Steve Vilicich advised his brother, John Vilicich, a PQF owner and marine insurance broker, and August Mardesich, PQF's managing partner and a lawyer, that a similar vessel, the ALASKA REEFER owned by the Vilicich family, had been cited for violating the Tanker Act by carrying bulk gasoline (Ex. 409, TP. 71-2, 76-8, R. 1650-53). But PQF made no effort to discharge their remaining 2000 gallons aboard the PACIFIC QUEEN, or to correct the more dangerous situation aboard her.

One of PQF's partners (Concl. X, R. 285-6), William Peck, testified that, when he was Chief Engineer of the PACIFIC QUEEN, he and another partner, Hull, suggested to Mardesich, Breskovich, Barovic and Jonsich, that they obtain Coast Guard inspection but they refused and therefore the PACIFIC QUEEN was not inspected (R. 1684-6).

Peck also testified it was a want of due diligence for the vessel to carry bulk gasoline aboard in the hazardous condition described above (R. 1680-1689).

Under English Law and usage only a

"lawful marine adventure may be the subject of marine insurance";

and

> "there is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner."
>
> *Marine Insurance Act* §§ 3(1), 41.

9 *Chalmers, Marine Insurance Act,* 1906 (5th ed., London, 1956) citing §41, *supra,* and *Waugh v. Morris* (1873) L.R. 8 Q.V. 202, states:

> "A contract to do a thing which cannot be done without a violation of the law is void, whether the parties know the law or not."

Arnould Marine Insurance, § 738 (15th ed., 1961) states at page 696:

> "it is * * * obvious that no court, consistently with its duty can lend itself to the enforcement of a contract which * * * necessarily involves a violation of the laws the court is bound to enforce."

Under English law and usage where an owner knowingly permitted the vessel to sail *without a certificate* and part of its cargo was on deck and in violation of English law, purported insurance is void.

Cunnard v. Hyde (1859), 29 L.J.Q.B. 6;

Accord: *Perkins v. Dick* (1809), 2 Campbell 221.

Where a vessel sailed without a license in violation of an Act of Parliament, Lord Ellenborough held the insurance was void even though the prohibited goods formed a very small portion of the venture. The court said:

> "I have no scales to weigh degrees of legality."

Cf. 2 *Arnould,* §749, pp. 675-6.

American cases are accord such as *United States Bank v. Owens,* 2 Peters (27 U.S.) 527, 538-9 (1829); quoting with approval *Watts v. Brooks,* 3 Ves. Jr., 612; and more recent ones as *Lineas Aereas Colombianas Exp. v. Travelers' Fire I. Co.,* 257 F.2d 150, 154 (CA 5, 1958), where illegality was

held to have avoided the policies because, among other things, it would if known have been a factor which the insurers would consider of underwriting importance. Compare *Thompson v. Hopper,* 6 E. & B. 172; (1856) 119 Eng. 833, *supra,* "the law gives it as security to the insurer so that insurance may be a prudent mercantile investment."

Similarly in Canada, the operation of a plane in violation of regulations was illicit and avoided the policy.

Obolski Chidouganau Mining Co. v. Aero Ins. Co. [1932] Canada SC 540 (1932) 3 D.D.L.R. 25.

Note 9 ALR 2d 583-4

But PQF now asks how violation of the Tanker Act can constitute unseaworthiness or negligence or want of due care (PQF Op. Br. 46). The answer is Finding XIX, R. 278, which is unchallenged that:

> "If the vessel had been inspected by the Coast Guard, the gasoline discharge facilities below deck would not have been approved."

A vessel operating in violation of recognized safety standards is unseaworthy.

Cf. *Kernan v. American Dredging Co.,* 355 U.S. 426, 427-8.

It is axiomatic that violations of safety laws, whether on ship, or the highways or elsewhere, are frequently acts of negligence or want of due diligence.

Coast Guard regulations have the force of law.

Belden v. Chase, 150 U.S. 674, 698 (1893);

Petition of Skiva A/S Julund, 250 F.2d 777, 786 (CA 2, 1957 per 9th Cir. J. Pope).

It was the duty of PQF to make application for inspection and to obtain a certificate to transport bulk gasoline.

46 CFR Part 31, § 31.01.15.

An early case, *The Jacob G. Neafie,* No. 7156, 13 Fed. Cas.

266 (1875, D.C.N.Y.), explains the necessity of imposing this duty upon the owners.

> "*The intention of the statute*[1] *is* manifestly *to cast upon the owner* of a vessel *the reponsibility of setting in motion the local inspector by a written application;* and it proceeds upon the presumption that the inspectors, being public officers, will discharge their duty when applied to. *This construction is necessary to preserve the efficiency of the statute. To construe it otherwise is to leave it optional with the owner of the vessel whether his vessel be inspected or not, for the duty to inspect, and perhaps also the power, is dependent upon the fact that written application for inspection is made* * * *."

PQF did not comply for the 1957 season. The application could have been made to local Coast Guard authorities on the very simple form which PQF's owner Breskovich had made for the 1949 voyage of the PACIFIC QUEEN carrying reefer cargo to Hawaii (PQF Ex. 45-1, designated but not printed).

Finally, PQF had the burden of proof to show their claim was within the perils insured against.

PQF's Brief, p. 13-14, cites two cases on burden of proof, *Hart-Bartlett-Sturdeman Grain Co. v. Aetna Ins. Co.,* 293 S.W.2d 913, 365 Mo. 1134 (1956) and *Hartford Fire Ins. Co. v. Empire Coal Co.,* 30 F.2d 794 (CA 8, 1929). Both relate to inland policies which covered explosions without any Inchmaree exclusion for loss that results from want of due diligence of the owners or manager.

In *Crist v. U. S. War Shipping Administration,* 163 Fed. 2d 145, 152 (CA 3, 1947) the court held:

> "It is too well settled to require citations that the burden of proving a loss by a peril insured against is on the insured."

[1] Prior statute substantially same as 46 CFR Part 31, 31.01.15.

Accord: *Indemnity Marine Assurance Co. v. Cadiente,* 188 F.2d 741 (CA 9, 1951);

Solberg v. Western Assurance Co., 119 F.23 (CCA 9, 1902).

The relevant issue in burden of proof is a procedural rule predicated on statutory fault. Its roots are imbedded in English marine insurance law. The leading case in Great Britain is *The Fenham,* 23 L.T. (N.S.) 329-330 (F.C.) L.R. 3 F.C. 212 (1870); 6 Moo. P.C. N.S. 501. There the English Court held that the violation of a statutory duty to show lights imposed a burden of proof on the violator to show that the violation could not possibly have contributed to this disaster. The British Court said in part:

> "* * * *it is of the greatest possible importance,* having regard to the Admiralty regulations and to the necessity of enforcing obedience to them, *to lay down this rule* * * *, the burden lies on her to show that the non-compliance* with the regulations *was not the cause of the collision."*

In America there followed the celebrated *Pennsylvania* case, 86 U.S. (19 Wall) 125 (1873). It reviewed English law and cited with approval *The Fenham.* The statutory fault related to fog signals. The Supreme Court said at page 136:

> *"In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of a statute."*

After quoting from *The Fenham* the Court recognized that this is a heavy burden of proof:

> "In some cases it is possible to show this with entire certainty. In others it cannot be. * * * To go into the inquiry whether the legislature was not in error * * * was out of place. It would be substituting our judgment for the judgment of the lawmaking power."

This case has been followed a host of times.

It is obviously difficult to find an exact parallel in British or American law. We start therefore with the basic principle, and apply it as near as can be by analogy to parallel cases. As was said by Justice Holmes:

> " 'There are special reasons for keeping harmony with the Marine Insurance Laws of England, — the great field of this business, * * *' ."
>
> *Queen Ins. Co. v. Globe Ins. Co.,* 263 U.S. 487, 492-3.

This burden of proof principle has been applied in various insurance cases involving violation of Coast Guard regulations.

The Material Service, 1937 AMC 925 (E.D. Wis. 1937) cited with approval in

The Denali, 112 F.(2d) 953, 956 (CA 9, 1940);

The Material Service, on appeal, *sub nom. Leathem-Smith Putnam Nav. Co. v. Nat'l. U. Fire Ins. Co.*, 96 F.2d 923, 927 (CA 7, 1938);

Richelieu Navig. Co. v. Boston Ins. Co., 136 U.S. 408, 422-3 (1890);

The Princess Sophia, 61 F.2d 339, 347 (CA 9, 1932).

The failure to comply with the inspection law has similarly been invoked to prove that the owner is not entitled to the benefit of the limitation of liability.

The Annie Faxon (CCA 9, 1896) 75 F. 312, 320;

The Boat Demand (DC Mass. 1958) 160 F.Supp. 833;

States S.S. Co. v. United States (CA 9, 1957, 1958) 259 F.2d 458 (on rehearing);

Petition of Oskar Tiedmann & Co., 183 F.Supp. 129, 130-1 (D.C. Del., 1960), unsafe operation of tanker leaving condition "*as potentially dangerous as a live bomb.*"

In addition, the rule in *The Pennsylvania* has been held applicable:

To *a salvage claim, Waterman S.S. Corp. v. Shipowners & Merchants Towboat Co.* (CA 9, 1952), 199 F.2d 600;

To *berthing, Standard Transp. Co. v. Wood Towing Corp.,* 64 F.2d 282 (CA 4, 1933).

To *a claim for damages from grounding, Pittsburgh S. E. Co. v. The Atomic,* D.C. Mich., 1952, 107 F.Supp. 631.

The rule is well summarized in *the Lansdowne* (D.C. Mich. 1900) 105 Fed. 436, 443:

> "Both the American and English courts hold that where a vessel has disregarded a rule of navigation, it is incumbent upon her to show, in case of collision *or other disaster* that the violation of the statute not only did not but could not have contributed to the collision."

It seems clear that, under the rule of the *Pennsylvania* case, following *The Fenham* and especially as enunciated in *The Material Service,* 1937 AMC 925, aff'd. 96 F.2d 923, 927, and cited with approval by the 9th Circuit in *The Denali,* 112 F.2d 953, 956, plaintiffs may not recover on this ground of defense unless they can prove that their unlawful carriage of bulk gasoline could not possibly have contributed to the casualty.

> "The underwriters had a right to believe that the owners of the vessel had complied with the law."
>
> * * *
>
> "Inasmuch as libelants failed to comply with the (Coast Guard) regulation, they had the burden of showing that their default did not contribute to disaster and did not meet the burden."
>
> *Leathem-Smith Putnam Nav. Co. v. Nat'l U. F. Ins. Co.*, 96 F.2d 923, 927, 928 (CA 7, 1938).

G. Hull, Peck and Royer Were Partners in Pacific Queen Fisheries at the Time of the Loss, Were Necessary Parties Plaintiff to This Action, and Their Admissions Were Binding Upon PQF.

Whatever its nature, it is admitted by all concerned that Hull, Peck and Royer had some type of interest in PQF. Hull states his interest to be worth about $5,000 (R. 1497-1499) and the interests of Peck and Royer are at least half that large (See Exhibit 376, designated but not printed). Clearly each of these persons has a substantial interest in the outcome of this litigation.

The sale of an interest in a partnership does not of itself make the purchaser a partner. RCW 25.04.270 (1) states:

> "A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignees, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs * * *."

United States v. Coson, 286 F.(2d) 453 (CA 9, 1961), cited in PQF's Opening Brief 50, stands for exactly this proposition.

But there was an agreement in PQF. The sale of an interest in the partnership was specifically covered by the partnership agreement. Article XI of both the agreement dated April, 1949 (Ex. 265, designated but not printed) and that dated April, 1957 (Ex. 274, designated but not printed) states:

> "Any part owner desiring to sell his interest in said vessel shall have the right to do so provided that said interest is first offered to the other owners. * * * Should none of the other owners desire to purchase the interest of the selling owner, the selling owner shall have the privilege to sell his interest to any other person,

provided said other person is acceptable to the remaining owners."

(R. 1311-1312, 1315-1316, 1619-1620, 1663-1665).

Breskovich and Mardesich both admit that Breskovich abided by this requirement of the partnership agreement, that the other partners turned down the opportunity to buy the portion of Breskovich's interest which was for sale, and that the other partners agreed to the sale to Hull, Peck and Royer (R. 1314-1315, 1619-1620). Thereafter, Hull and Peck, if not Royer, attended meetings of PQF (R. 1673). Mardesich referred to Hull, Peck and Royer as partners (R. 1619). The income tax returns for PQF, prepared by Hull, all refer to Hull, Peck and Royer as "partners" without differentiating in any manner from the other partners of the venture (Exs. 371-373, 376-377, all designated but not printed).

It is clear, therefore, by the acts of the partners themselves in including Hull, Peck and Royer in partnership conferences, in referring to them as partners both orally and in their tax returns, and in accepting them as per the partnership agreement itself, that Hull, Peck and Royer are full partners in the PACIFIC QUEEN.

As partners in PQF, Hull, Peck and Royer are necessary parties plaintiff to this action. *Seltzer v. Chadwick,* 26 Wn.(2d) 297, 173 P.(2d) 991 (1946).

Because Hull, Peck and Royer are partners in PQF and necessary parties plaintiff herein, admissions against the interest of PQF made by Hull and Peck, either by deposition or on trial, are admissible against PQF. 40 *Am. Jur. Partnership,* Sec. 443.

See also RCW 25.04.110; *Akers v. Lord,* 67 Wash. 179, 121 Pac. 51 (1912); *Merrill v. O'Bryan,* 48 Wash. 415, 93 Pac. 917 (1908).

Moreover, the proposition that the admissions or decla-

rations against the interest of PQF, made by Hull and Peck are admissible against the firm, does not depend upon their formal status of partners. It is sufficient that they had a substantial pecuniary interest in PQF, as admitted by all of the partners. 20 *Am. Jur. Evidence,* Sec. 589.

The damaging admissions made by Hull and Peck are included in the portions of their depositions printed in the record, references to which are made in Appendix V relating to contested Findings of Fact.

H. Suit Against Respondent Buffalo Insurance Company Is Barred by a Contractual Limitation of Action.

Pursuant to an agreement dated June 1, 1951, as subsequently amended, Hansen & Rowland, Inc., are authorized by Talbot, Bird & Company, as marine manager for Buffalo Insurance Co., to receive and accept proposals for marine insurance for defendant, Buffalo Insurance Co., in the States of Washington, Oregon and California. Pursuant to this agreement, Hansen & Rowland, Inc., was supplied with a number of blank policy forms of Buffalo Insurance Co., each serially numbered by the company. As each policy is executed, it must be accounted for, and Hansen & Rowland was required to supply copies of all information on risks to which it committed defendant, Buffalo Insurance Co., to Talbot, Bird & Co. (R. 876-888).

On June 10, 1957, Hansen & Rowland filled in all necessary insurance information on a blank form of Buffalo Insurance Co. policy, but did not countersign it. Three copies of a "Daily Report" were received by Talbot, Bird & Co. from Hansen & Rowland not later than June 25, 1957. This "Daily Report" included carbon copies of the information on the specific risk appearing on the original policy, but it

did not include either the printed material on the policy or the space for countersignature (R. 882-888; Ex. 281-1).

Shortly after filling out the Buffalo policy, Hansen & Rowland filed it in its correspondence file on "PQF" as their broker. This file also contained the other policies issued by defendants Utah Home and Atlas (R. 894-898; Exs. 281-283).

Under the circumstances, PQF makes no claim that the Buffalo Insurance policy was not delivered. Delivery was accomplished by its transfer into the file which Hansen & Rowland kept for PQF as the latter's brokers. 1 *Appleman, Insurance Law & Practice,* § 132; *Riley v. Aetna Insurance Co.,* 80 W. Va. 236, 92 S.E. 417, LRA 1917E 983 (1917); *Frye v. Prudential Insurance Co.,* 157 Wash. 88, 288 Pac. 262 (1930).

It is admitted that the Buffalo Insurance Co. policy here in question is not countersigned. It is also admitted that the policy provides:

> "This policy shall not be valid unless countersigned by the duly authorized Agents of this Company."

Faced with a similar question, the Supreme Court of North Dakota stated in *Ulledalen v. United States Fire Insurance Co.,* 74 N.D. 589, 23 N.W.2d 856 (1946) at 868:

> "The counter-signing of the policy by the agent is a ministerial act of authentication. * * * To 'counter-sign' an instrument is to sign what has already been signed by a superior; to authenticate by an additional signature. * * * The absence of the counter-signature of an agent to an insurance policy does not render the policy inoperative where the intention that it should be effective is otherwise sufficiently plain. * * * The counter-signing of the policy was a matter for the insurance company. The insured had no duty with respect thereto. In the very nature of things, the failure

of the insurer to perform such act cannot be made the basis of defense against liability."

To the same effect, see 15 Appleman, *Insurance Law & Practice,* § 8257; 16 Appleman, *supra,* § 9143; 17 Appleman, *supra,* § 9442; *Continental Casualty Co. v. Monarch Transfer & Storage Co.,* 23 S.W.2d 209 (Mo. App., 1930); *State ex rel Chorn v. Hudson,* 222 S.W. 1049 (Mo. App., 1920).

Plaintiffs' assertion that defendant Buffalo Insurance Co.'s policy is void for want of countersignature by Hansen & Rowland puts them in an impossibly inconsistent position. Their entire case depends upon the enforcibility of Endorsement No. 2 to the Certificate of Insurance which extended the operating period of the PACIFIC QUEEN through the date of the explosion, which was unsigned (R. 85). If the act of affixing an original signature to that endorsement is purely ministerial and does not affect the enforcibility of the endorsement, how can a mere countersignature on a policy treated by plaintiffs' brokers in exactly the same way as the admittedly valid policies of defendants Utah Home and Atlas go to the validity of the Buffalo policy?

The policy (Ex. 281-1), provides:

> "No suit or action on this Policy for the recovery of any claim shall be sustainable in any Court * * * unless commenced within *twelve months* next after the calendar date of *the happening of the physical loss* or damage out of which the said claim arose * * *." (Emphasis added)

The loss occurred September 17, 1957. This suit was brought May 11, 1960, over two and one-half years later.

The limitation contained in the Buffalo policy is specifically authorized by RCW 48.18.200(1) (3), which provides that:

> "In contracts of * * * marine * * * insurance, such

limitation shall not be to a period of less than one (1) year from the date of the loss."

In *Hafner v. Great American Insurance Co.,* 126 Wash. 390, 218 Pac. 206 (1923), an almost identical policy limitation was upheld:

> "We have uniformly held that a clause in such a contract fixing a limitation of the time in which suit is sustainable is a valid one." 126 Wash. 390 at 391.

To the same effect, see *Hassett v. Pennsylvania Fire Ins. Co.,* 150 Wash. 502, 273 Pac. 145 (1929).

It is respectfully submitted that the portion of the Complaint directed at defendant, Buffalo Insurance Company,

I. There Is No Merit to PQF's Asserted Theory That They Were Wrongfully Denied a Jury Trial in No. 2348

PQF, in their Brief on appeal, raise for the first time the wholly new issue that they were denied a trial by jury as a matter of right in No. 2348, the companion case which was ultimately consolidated for trial with the principal cause, No. 2543.

1. Underwriters submit raising this new issue is not timely:

a. PQF's only reference to jury trial in their Statement of Points is No. 2 (R. 297a):

> "2. The Court erred in denying plaintiffs' Motion for Jury Trial on September 28, 1960."

They now change this Point in the caption in their brief by deleting the reference to the date of the Court's decision (PQF Op. Br. 52). The Court had before it on September 28, 1960, only the issue of discretionary jury trial in No. 2543 under Rule 39(b), since timely demand was not made under Rule 38(b) (R. 312, third paragraph; Augmented Record,[1] Items 3, 4 and 5; R. 224). PQF has now presum-

[1] Underwriters Motion to Augment the Record, dated March 26, 1962, served and filed March 27, 1962, attached five items as described therein.

ably abandoned any claim of error in the Court's decision of September 28, 1960, denying discretionary jury trial (R. 224) F.R.Civ.P. 39(b) since this issue is not mentioned in their brief.

b. Nor did PQF's Statement of Points (R. 297a-h) claim error in the Court's Finding that:

> "III. Trial to the Court. Trial was to the Court. A jury trial was tardily asked in No. 2543, but was held to have been waived because demand was not timely. *No jury trial was demanded in No. 2348.* At plaintiffs' request, the two cases were consolidated for trial." (Emphasis added) (R. 251)

c. In view of PQF's abandonment of any claimed abuse of discretion by the Trial Court in its decision of September 28, 1960, and of their failure to attack Finding III in their Statement of Points, Underwriters submit there is no issue with respect to jury trial now properly before this Court. An appellate court will not normally consider an issue raised for the first time on appeal.

> *United States v. Marshall*, 230 F.(2d) 183, 193 (CA 9, 1956);
>
> *Hebets v. Scott,* 152 F.(2d) 739, 741, (CA9, 1945);
>
> *Humble Oil Co. v. Martin,* 298 F.(2d) 163, 168 (CA5, 1961) (Adv. Sh.);
>
> 3 *Am. Jur.,* Appeal and Error, § 246, pp. 25-32.

2. However, in order to dispel any doubt as to the lack of substance in PQF's new contention, Underwriters will briefly consider the issue on its merits.

a. Underwriters respectfully submit the contention is wholly without merit. On September 26, 1960, at the time set by the Court to hear oral argument on PQF's Motion under Rule 39(b) for jury trial of No. 2543, PQF, as a complete surprise to Underwriters (Augmented Record, Item 5, p. 3), on their own initiative moved to return to the Fed-

eral Court No. 2348, which was then pending as a State Court action having been earlier remanded, and to consolidate it with No. 2543 (R. 223). Counsel for PQF addressed the Court as follows:

> "Let us put them all in one basket, and I still think this court erred, [presumably in denying remand of No. 2543 (R. 128)] but that is neither here nor there. It is done, so let us put them together and try them in that fashion." (Augmented Record, Item 5, p. 2)

No question was raised by PQF concerning jury trial of No. 2348. That this could hardly be oversight is evident, for immediately following the Court's approval of PQF's motion to consolidate the two actions, they argued that a discretionary jury trial should be granted in No. 2543 under Rule 39(b). Not a single reference was made in 52 pages of transcript of that day's argument to any *right* to jury trial in No. 2348 (Augmented Record, Item 5). If PQF really believed there was substance to the contention now raised, it was needless to argue that the Court should grant a discretionary jury trial in No. 2543. Jury trial would have been theirs in the consolidated case as a matter of right, not of discretion.

There can be no dispute that PQF fully understood the issue was to be limited to the matter of discretion in No. 2543. Their Memorandum in Support of Motion for Jury Trial (Augmented Record, Item 3) served that same day, September 26, 1960, just before PQF made their motion to consolidate, conceded—

> " * * * plaintiffs may not have a jury trial as of right. However, this Court in its discretion may upon proper application grant an order placing the matter upon the Civil Jury Calendar. The authority for such an order lies in Rule 39(b) of the Federal Rules of Civil Procedure * * *. Plaintiffs have moved the court *for such*

> *an order* and submit this brief in support of their application." (Augmented Record, Item 4, pp. 1-2).

PQF then took the Court's time to hear argument and consider briefs restricted to Rule 39(b). Instead of presenting this novel contention for fair consideration by the Court and Underwriters, PQF remained mute on their new theory until their cause had been fairly lost after a prolonged, meticulous trial over seventeen days and after extensive post trial proceedings held by the Court to settle the Findings and Conclusions. If seasonably advised, the District Court would have weighed the matter with some deliberateness in considering its then assigned calendar (Augmented Record, Item 2). See *American Life Ins. Co. v. Stewart,* 300 U.S. 203, 215-16 (1937). But not until their Opening Brief on Appeal did PQF choose to speak out on this contention.

b. In any event, PQF never perfected a jury demand either in the State Court under Washington statutes or in the Federal Court under the Federal Rules of Civil Procedure. PQF err in claiming they had "*perfected*" their right to jury trial in "accordance with Rules of Practice in the Superior Court of the State of Washington." (PQF Op. Br. 50). The right to jury trial in the State Court is governed by RCW 4.44.100. This statute expressly requires that a statement electing jury trial be both served and *filed* and a jury fee paid. Unless such statement "*is filed*"

> " * * * the parties shall be deemed to have *waived* trial by jury and *consented* to a trial by court." (See Appendix IV.)

While PQF served a jury demand on July 22, 1960, they never filed it. Hence, any right to jury trial in the State Court was never perfected. As a result, not only did the Federal Court have no notice of the now claimed right to jury in No. 2348 when PQF moved to consolidate on Sep-

tember 26, 1960, but also the Federal Court Clerk had no notice when on October 28, 1960, PQF complied with the Clerk's request to—

> "physically remove the files of [No. 2348] from the superior court and file them with the Clerk of the Federal Court for the purpose of the consolidated trials which are to commence on October 31, 1960." (R. 46-7).

Nor was any such demand ever filed in Federal Court in No. 2348 pursuant to Rule 5(d), F.R. Civ. P., which required PQF to file any jury demand *"within a reasonable time."* The importance of *filing* a jury demand is emphasized by Rule 38(d), F. R. Civ. P., which specifically requires that a jury demand be filed pursuant to Rule 5(d) and, upon failure to do so, applies the penalty of waiver of trial by jury; 1 *Moore's Federal Practice,* 1353; 1 *Barron & Holtzoff, Federal Practice and Procedure,* 769. At no time did PQF file a jury demand as required by the Federal Rules. Therefor, whatever relevance Rule 81(c) could possibly have to the anomalous circumstance where the *plaintiffs* seek to have a pending State court action tried in the Federal Court, PQF can obtain no support from that Rule for their new theory that they were improperly denied a jury in No. 2348 in view of the fact they never perfected any such right in No. 2348 in either the State or Federal Court proceedings.

c. Lastly, PQF presented a stipulation on October 31, 1960, just before trial in the District Court (R. 48) the purpose of which was to make the Pre-Trial Order in No. 2543 applicable also to No. 2348. It provided in part:

> "* * * *since the issues and contentions of the parties are the same or similar* * * * the pretrial order heretofore entered in Cause No. 2543 * * * shall be deemed * * * applicable to and controlling upon issues of this case * * * but * * * (shall) not foreclose either party from

> the right or privilege of * * * *making any contention which is necessary to the proper presentation of that party's case* * * *.*'' (R. 48)

At the time this Stipulation was entered, PQF again remained silent with respect to any new ''contention'' of right to jury trial in No. 2348. It made no such ''contention'' whatsoever.

> ''* * * it is a well recognized rule of frequent application that a party litigant many not sit quiet at the time action is taken in the trial court and then complain on appeal. He is required to indicate in some appropriate manner his objection or dissent.''
>
> *Occidental Petroleum Corp. v. Walker,* 289 F.(2d) 1, 6 (CA10, 1961).

See also:

> *Gilby v. Travelers Insurance Company,* 248 F.2d 794 at 797 (CA8, 1957);
>
> *Weiss v. Duro Chrome Corp.,* 207 F.2d 298, 300 (CA 8, 1953).

The court properly heard the consolidated cases as non-jury cases, and no error or prejudice exists.

VII. CONCLUSION

It is respectfully submitted the appeal should be dismissed, or the judgment affirmed for violations of this Court's rules; or that the judgment should be affirmed on the merits on each of the grounds briefed above; and Underwriters should be allowed their costs and disbursements herein.

Dated at Seattle, Wash., April 6, 1962.

ALBERT E. STEPHAN
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APPENDICES

APPENDIX I

MARINE INSURANCE ACT, 1906[1]

6 Edw. 7, c. 41

Marine Insurance

Marine insurance defined

1. A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.

Marine adventure and maritime perils defined

3.—(1) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.

(2) In particular there is a marine adventure where—

(a) Any ship goods or other movables are exposed to maritime perils. Such property is in this Act referred to as "insurable property";

(b) The earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils;

(c) Any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.

[1] Excerpts from 2 Arnould, Marine Insurance (1954) 1186 ff. See F. F. XVII A; R. 277.

"Maritime perils" means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy.

Insurable Interest

* * *

Insurable interest defined

5.—(1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.

(2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.

When interest must attach

6.—(1) The assured must be interested in the subject-matter insured at the time of the loss though he need not be interested when the insurance is effected:

Assignment of interest

15. Where the assured assigns or otherwise parts with his interest in the subject-matter insured, he does not thereby transfer to the assignee his rights under the contract of insurance, unless there be an express or implied agreement with the assignee to that effect.

But the provisions of this section do not affect a transmission of interest by operation of law.

Disclosure and Representations

Insurance is uberrimae fidei

17. A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

Disclosure by assured

18.—(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) In the absence of inquiry the following circumstances need not be disclosed, namely:—

(a) Any circumstance which diminishes the risk;

(b) Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;

(c) Any circumstance as to which information is waived by the insurer;

(d) Any circumstance which it is superflous to disclose by reason of any express or implied warranty.

(4) Whether any particular circumstance, which is

not disclosed, be material or not is, in each case, a question of fact.

(5) The term "circumstance" includes any communication made to, or information received by, the assured.

Disclosure by agent effecting insurance

19. Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer—

(a) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and

(b) Every material circumstance which the assured is bound to disclose, unless it come to his knowledge too late to communicate it to the agent.

Representations pending negotiation of contract

20.—(1) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue the insurer may avoid the contract.

(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.

(4) A representation as to a matter of fact is true, if it be substantially correct, that is to say, if the differ-

ence between what is represented and what is actually correct would not be considered material by a prudent insurer.

(5) A representation as to a matter of expectation or belief is true if it be made in good fatih.

(6) A representation may be withdrawn or corrected before the contract is concluded.

(7) Whether a particular representation be material or not is, in each case, a question of fact.

When contract is deemed to be concluded

21. A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped.

* * *

Warranties, etc.

Nature of warranty

33.—(1) A warranty, in the following sections relating to warranties, means a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts.

(2) A warranty may be express or implied.

(3) A warranty, as above defined, is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date.

When breach of warranty excused

34.—(1) Non-compliance with a warranty is excused when, by reason of a change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, or when compliance with the warranty is rendered unlawful by any subsequent law.

(2) Where a warranty is broken, the assured cannot avail himself of the defence that the breach has been remedied, and the warranty complied with, before loss.

(3) A breach of warranty may be waived by the insurer.

Express warranties

35.—(1) An express warranty may be in any form of words from which the intention to warrant is to be inferred.

(2) An express warranty must be included in, or written upon, the policy, or must be contained in some document incorporated by reference into the policy.

(3) An express warranty does not exclude an implied warranty, unless it be inconsistent therewith.

* * *

Warranty of seaworthiness of ship

39.—(1) In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.

(2) Where the policy attaches while the ship is in port, there is also an implied warranty that she shall, at the commencement of the risk, be reasonably fit to encounter the ordinary perils of the port.

(3) Where the policy relates to a voyage which is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, there is an implied warranty that at the

commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purposes of that stage.

(4) A ship is deemed to be seaworthy when she is reasonably fit in all repects to encounter the ordinary perils of the seas of the adventure insured.

(5) In a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure, but where, with the privity of the assured, the ship is sent to sea in an unseaworthy state, the insurer is not liable for any loss attributable to unseaworthiness.

* * *

Warranty of legality

41. There is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.

* * *

Policy effected through broker

53.—(1) Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium.

(2) Unless otherwise agreed, the broker has, as against the assured, a lien upon the policy for the amount of the premium and his charges in respect of effecting the policy; and, where he has dealt with the person who employs him as a principal, he has also a lien on the policy in respect of any balance on any insurance account which may be due to him from such

person, unless when the debt was incurred he had reason to believe that such person was only an agent.

Effect of receipt on policy

54. Where a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between the insurer and the assured, but not as between the insurer and broker.

Loss and Abandonment

Included and excluded losses

55.—(1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.

(2) In particular,—

(a) The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew;

(b) Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against;

(c) Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordinary leakage and breakage, in-

herent vice or nature of the subject-matter insured, or for any loss proximately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils.

Partial and total loss

56.—(1) A loss may be either total or partial. Any loss other than a total loss, as hereinafter defined, is a partial loss.

(2) A total loss may be either an actual total loss, or a constructive total loss.

APPENDIX II

"TANKER ACT" [2]

§ 391a. Vessels having on board inflammable or combustible liquid cargo in bulk

(1) Vessels included

All vessels, regardless of tonnage, size, or manner of propulsion, and whether self-propelled or not, and whether carrying freight or passengers for hire or not, that shall have on board any inflammable or combustible liquid cargo in bulk, except public vessels owned by the United States, other than those engaged in commercial service, shall be considered steam vessels for the purposes of title 52 of the Revised Statutes and shall be subject to the provisions thereof: *Provided,* That this section shall not apply to vessels having on board only inflammable or combustible liquid for use as fuel or stores or to vessels carrying liquid cargo only in drums, barrels, or other packages.

(2) Rules and regulations for handling liquid cargo

In order to secure effective provision against the hazards of life and property created by the vessels to which this section applies, the Commandant of the Coast Guard shall establish such additional rules and regulations as may be necessary with respect to the design and construction, alteration, or repair of such vessels, including the superstructures, hulls, places for stowing and carrying such liquid cargo, fittings, equipment, appliances, propulsive machinery, auxiliary machinery, and boilers thereof; and with respect to all materials used in such construction, alteration, or repair; and with respect to the handling and stowage of such liquid cargo; the manner of such handling or stowage,

[2] From 46 U.S.C.A. § 391a.

and the machinery and appliances used in such handling and stowage; and with respect to equipment and appliances for life-saving and fire protection; and with respect to the operation of such vessels; and with respect to the requirements of the manning of such vessels and the duties and qualifications of the officers and crews thereof; and with respect to the inspection of all the foregoing. In establishing such rules and regulations the Commandant of the Coast Guard may adopt rules of the American Bureau of Shipping or similar American classification society for classed vessels insofar as such rules pertain to the efficiency of hulls and the reliability of machinery of vessels to which this section applies. In establishing such rules and regulations, the Commandant of the Coast Guard shall give due consideration to the kinds and grades of such liquid cargo permitted to be on board such vessel.

(3) Hearing before approval of rules

Before any rules and regulations, or any alteration, amendment, or repeal thereof, are approved by the Commandant of the Coast Guard under the provisions of this section, except in an emergency, the said Commandant shall publish such rules and regulations and hold hearings with respect thereto on such notice as he deems advisable under the circumstances.

(4) Certificate of inspection and permit required; time of indorsing permit; inspection; duration of permit; vessels of foreign-nations; permit for prohibited materials

No vessel subject to the provisions of this section shall, after the effective date of the rules and regulations established hereunder, have on board such liquid cargo, until a certificate of inspection has been issued to such vessel in accordance with the provisions of title 52 of the Revised Statutes and until a permit has been

endorsed on such certificate of inspection by the Coast Guard, indicating that such vessel is in compliance with the provisions of this section and the rules and regulations established hereunder, and showing the kinds and grades of such liquid cargo that such vessel may have on board or transport. Such permit shall not be endorsed by the Coast Guard on such certificate of inspection until such vessel has been inspected by the Coast Guard and found to be in compliance with the provisions of this section and the rules and regulations established hereunder. For the purpose of any such inspection approved plans and certificates of class of the American Bureau of Shipping or other recognized classification society for classed vessels may be accepted as evidence of the structural efficiency of the hull and the reliability of the machinery of such classed vessels except as far as existing law places definite responsibility on the Coast Guard. A permit issued under the provisions of this section shall be valid for a period of time not to exceed the duration of the certificate of inspection on which such permit is endorsed, and shall be subject to revocation by the Coast Guard whenever it shall find that the vessel concerned does not comply with the conditions upon which such permit was issued: *Provided,* That the provisions of this subsection shall not apply to vessels of a foreign nation having on board a valid certificate of inspection recognized under law or treaty by the United States: *And provided further,* That no permit shall be issued under the provisions of this section authorizing the presence on board any vessel of any of the materials expressly prohibited from being thereon by subsection (3) of section 170 of this title.

(5) Shipping documents required on board; contents

Vessels subject to the provisions of this section shall

have on board such shipping documents as may be prescribed by the Commandant of the Coast Guard indicating the kinds, grades, and approximate quantities of such liquid cargo, on board such vessel, the shippers and consignees thereof, and the location of the shipping and destination points.

(6) Number of officers and tankermen; certificate as tankerman; suspension or revocation of certificate

(a) In all cases where the certificate of inspection does not require at least two licensed officers, the Coast Guard shall enter in the permit issued to any vessel under the provisions of this section the number of the crew required to be certificated as tankermen.

(b) The Coast Guard shall issue to applicants certificates as tankerman, stating the kinds of liquid cargo the holder of such certificate is, in the judgment of the Coast Guard, qualified to handle aboard vessels with safety, upon satisfactory proof and examination, in form and manner prescribed by the Commandant of the Coast Guard, that the applicant is in good physical condition, that such applicant is trained in and capable efficiently to perform the necessary operations aboard vessels having such liquid cargo on board, and that the applicant fulfills the qualifications of tankerman as prescribed by the Commandant of the Coast Guard under the provisions of this section. Such certificates shall be subject to suspension or revocation on the same grounds and in the same manner and with like procedure as is provided in the case of suspension or revocation of licenses of officers under the provisions of section 239 of this title.

(7) Penalties

The owner, master, or person in charge of any vessel subject to the provisions of this section, or any or all of

them, who shall voliate the provisions of this section, or of the rules and regulations established hereunder, shall be subject to a fine of not more than $1,000 or imprisonment for not more than one year, or both such fine and imprisonment.

(8) Effective date of rules and regulations

The rules and regulations to be established pursuant to this section shall become effective ninety days after their promulgation unless the Commandant of the Coast Guard shall for good cause fix a different time. R.S. 4417a as added June 23, 1936, c. 729, 49 Stat. 1889, and amended Oct. 9, 1940, c. 777, § 3, 54 Stat. 1028; 1946 Reorg. Plan No. 3, §§ 101-104, eff. July 16, 1946, 11 F.R. 7875, 60 Stat. 1097.

APPENDIX III

CARRIAGE OF EXPLOSIVES OR DANGEROUS SUBSTANCES ACT[3]

170. Regulation of carriage of explosives or other dangerous articles on vessels — Vessel defined

(1) The word "vessel" as used in this section shall include every vessel, domestic or foreign, regardless of character, tonnage, size, service, and whether self-propelled or not, on the navigable waters of the United States, including its Territories and possessions, but not including the Panama Canal Zone, whether arriving or departing, or under way, moored, anchored, aground, or while in drydock; it shall not include any public vessel which is not engaged in commercial service, nor any vessel subject to the provisions of section 391a of this title, which is constructed or converted for the principal purpose of carrying inflammable or combustible liquid cargo in bulk in its own tanks: *Provided,* That the provisions of subsection (3) of this section shall apply to every such vessel subject to the provisions of section 391a of this title, which is constructed or converted for the principal purpose of carrying inflammable or combustible liquid cargo in bulk in its own tanks.

Passenger-carrying vessel defined

(2) The phrase "passenger-carrying vessel" as used in this section, when applied to a vessel subject to any provision of the International Convention for Safety of Life at Sea, 1929, means a vessel which carries or is authorized to carry more than twelve passengers.

Transportation, etc., of certain explosives prohibited

(3) It shall be unlawful knowingly to transport,

[3] From 46 U.S.C.A. § 170 ff.

carry, convey, store, stow, or use on board any vessel fulminates or other detonating compounds in bulk in dry condition, or explosive compositions that ignite spontaneously or undergo marked decomposition when subjected for forty-eight consecutive hours to a temperature of one hundred and sixty-seven degrees Fahrenheit, or compositions containing an ammonium salt and a chlorate, or other like explosives.

Transportation, etc., of certain high explosives on passenger-carrying vessels prohibited; exceptions

(4) It shall be unlawful knowingly to transport, carry, convey, store, stow, or use on board any passenger-carrying vessel any high explosives such as, and including, liquid nitroglycerin, dynamite, trinitrotoluene, picrates, detonating fuzes, fireworks that can be exploded en masse, or other explosives susceptible to detonation by a blasting cap or detonating fuze, except ships' signal and emergency equipment, and samples of such explosives (but not including liquid nitroglycerin) for laboratory or sales purposes in restricted quantities as may be permitted by regulations of the Commandant of the Coast Guard established hereunder.

Same; non-passenger-carrying vessels

(5) It shall be unlawful knowingly to transport, carry, convey, store, stow, or use on board any vessel other than a passenger-carrying vessel, any high explosive referred to in subsection (4) of this section except as permitted by the regulations of the Commandant of the Coast Guard established hereunder.

Transportation, etc., of other explosives or other dangerous articles; exceptions

(6) (a) It shall be unlawful knowingly to transport, carry, convey, store, stow, or use (except as fuel for its

own machinery) on board any vessel, except one specifically exempted by paragraph (b) of this subsection, any other explosives or other dangerous articles or substances, including inflammable liquids, inflammable solids, oxidizing materials, corrosive liquids, compressed gases, poisonous articles or substances, hazardous articles, and ships' stores and supplies of a dangerous nature, except as permitted by the regulations of the Commandant of the Coast Guard established hereunder: *Provided,* That all of the provisions of this subsection relating to the transportation, carrying, conveying, storing, stowing, or use of explosives or other dangerous articles or substances shall apply to the transportation, carrying, conveying, storing, stowing, or using on board any passenger vessel of any barrels, drums, or other packages of any combustible liquid which gives off inflammable vapors (as determined by flash-point in open cup tester as used for test of burning oil) at or below a temperature of one hundred and fifty degrees Fahrenheit and above eighty degrees Fahrenheit.

(b) This subsection shall not apply to—

(i) vessels not exceeding fifteen gross tons when not engaged in carrying passengers for hire;

(ii) vessels used exclusively for pleasure;

(iii) vessels not exceeding five hundred gross tons while engaged in the fisheries;

(iv) tugs or towing vessels: *Provided, however,* That any such vessel, when engaged in towing any vessel that has explosives, inflammable liquids, or inflammable compressed gases on board on deck, shall be required to make such provisions to guard against and extinguish fire as shall be prescribed by the Commandant of the Coast Guard;

(v) cable vessels, dredges, elevator vessels, fireboats, ice-breakers, pile drivers, pilot boats, welding vessels, salvage and wrecking vessels;

(vi) inflammable or combustible liquid cargo in bulk: *Provided, however,* That the handling and stowage of any inflammable or combustible liquid cargo in bulk shall be subject to the provisions of section 391a of this title.

Regulations for protection against hazards created by explosives or other dangerous articles

(7) In order to secure effective provisions against the hazards of health, life, limb, or property created by explosives or other dangerous articles or substances to which subsections (3)-(5) or (6) of this section apply—

(a) The Commandant of the Coast Guard shall by regulations define, describe, name, and classify all explosives or other dangerous articles or substances, and shall establish such regulations as may be necessary to make effective the provisions of this section with respect to the descriptive names, packing, marking, labeling, and certification of such explosives or other dangerous articles or substances; with respect to the specifications of containers for explosives or other dangerous articles or substances; with respect to the marking and labeling of said containers; and shall accept and adopt for the purposes above mentioned in this subsection such definitions, descriptions, descriptive names, classifications, specifications of containers, packing, marking, labeling, and certification of explosives or other dangerous articles or substances to the extent as are or may be established from time to time by the Interstate Commerce Commission insofar as they apply to shippers by common carriers engaged in interstate or foreign commerce by water. The Commandant of the Coast Guard shall also establish regula-

tions with respect to the marking, handling, storage, stowage, and use of explosives or other dangerous articles or substances on board such vessels; with respect to the disposition of any explosives or other dangerous articles or substances found to be in an unsafe condition; with respect to the necessary shipping papers, manifests, cargo-stowage plans, and the description and descriptive names of explosives or other dangerous articles or substances to be entered in such shipping documents; also any other regulations for the safe transportation, carriage, conveyance, storage, stowage, or use of explosives or other dangerous articles or substances on board such vessels as the Commandant of the Coast Guard shall deem necessary; and with respect to the inspection of all the foregoing mentioned in this paragraph. The Commandant of the Coast Guard may utilize the services of the Bureau for the Safe Transportation of Explosives and Other Dangerous Articles, and of such other organizations whose services he may deem to be helpful.

(b) The transportation, carriage, conveyance, storage, stowage, or use of such explosives or other dangerous articles or substances shall be in accordance with the regulations so established, which shall insofar as applicable to them, respectively, be binding upon shippers and the owners, charterers, agents, masters, or persons in charge of such vessels, and upon all other persons transporting, carrying, conveying, storing, stowing, or using on board any such vessels any explosives or other dangerous articles or substances: *Provided,* That this section shall not be construed to prevent the transportation of military or naval forces with their accompanying munitions of war and stores.

(c) Nothing contained in this section shall be construed to relieve any vessel subject to the provisions of

this section from any of the requirements of title 52 (secs. 4399 to 4500, inclusive) of the Revised Statutes or Acts amendatory or supplementary thereto and regulations thereunder applicable to such vessel, which are not inconsistent herewith.

(d) Nothing contained in this section shall be construed as preventing the enforcement of reasonable local regulations now in effect or hereafter adopted, which are not inconsistent or in conflict with this section or the regulations of the Commandant of the Coast Guard established hereunder.

(e) The United States Coast Guard shall issue no permit or authorization for the loading or discharging to or from any vessel at any point or place in the United States, its territories or possessions (not including Panama Canal Zone) of any explosives unless such explosives, for which a permit is required by the regulations promulgated pursuant to this section, are packaged, marked, and labeled in conformity with regulations prescribed by the Interstate Commerce Commission under section 835 of Title 18, and unless such permit or authorization specifies that the limits as to maximum quantity, isolation and remoteness established by local, municipal, territorial, or State authorities for each port shall not be exceeded. Nothing herein contained shall be deemed to limit or restrict the shipment, transportation, or handling of military explosives by or for the Armed Forces of the United States.

Masters, owners, etc., required to refuse unlawful transportation of explosives or other dangerous articles

(8) Any master, owner, charterer, or agent shall refuse to transport any explosives or other dangerous articles or substances in violation of any provisions of this section and the regulations established thereunder, and may require that any container or package which

he has reason to believe contains explosives or other dangerous articles or substances be opened to ascertain the facts.

Publication of, hearings on, and effective date of proposed regulations

(9) Before any regulations or any additions, alterations, amendments, or repeals thereof are made under the provisions of this section, except in an emergency, such proposed regulations shall be published and public hearings with respect thereto shall be held on such notice as the Commandant of the Coast Guard deems advisable under the circumstances. Any additions, alterations, amendments, or repeals of such regulations shall, unless a shorter time is authorized by the Commandant of the Coast Guard, take effect ninety days after their promulgation.

Tendering explosives or other dangerous articles for shipment without divulging true character or in violation of section

(10) It shall be unlawful knowingly to deliver or cause to be delivered, or tender for shipment to any vessel subject to this section any explosives or any other dangerous articles or substances defined in the regulations of the Commandant of the Coast Guard established hereunder under any false or deceptive descriptive name, marking, invoice, shipping paper, or other declaration and without informing the agent of such vessel in writing of the true character thereof at or before the time such delivery or transportation is made. It shall be unlawful for any person to tender for shipment, or ship on any vessel to which this section applies, any explosives or other dangerous articles or substances the transportation, carriage, conveyance, storage, stowage, or use of which on board vessels is prohibited by this section.

Exemption of vessels from section or regulations when compliance unnecessary for safety

(11) The Commandant of the Coast Guard may exempt any vessel or class of vessels from any of the provisions of this section or any regulations or parts thereof established hereunder upon a finding by him that the vessel, route, area of operations, conditions of the voyage, or other circumstances are such as to render the application of this section or any of the regulations established hereunder unnecessary for the purposes of safety: *Provided,* That except in an emergency such exception shall be made for any vessel or class of vessels only after a public hearing.

Agencies charged with enforcement

(12) The provisions of this section and the regulations established hereunder shall be enforced primarily by the Coast Guard of the Department of the Treasury; which with the consent of the head of any executive department, independent establishment, or other agency of the Government, may avail itself of the use of information, advice, services, facilities, officers, and employees thereof (including the field service) in carrying out the provisions of this section: *Provided,* That no officer or employee of the United States shall receive any additional compensation for such services, except as permitted by law.

Detention of vessels pending compliance with section and regulations; penalty for false swearing

(13) Any collector of customs may, upon his own knowledge, or upon the sworn information of any reputable citizen of the United States, that any vessel subject to this section is violating any of the provisions of this section or of the regulations established hereunder, by written order served on the master, person in

charge of such vessel, or the owner or charterer thereof, or the agent of the owner or charterer, detain such vessel until such time as the provisions of this section and of the regulations established hereunder have been complied with. If the vessel be ordered detained, the master, person in charge, or owner or charterer, or the agent of the owner or charterer thereof, may within five days appeal to the Commandant of the Coast Guard, who may, after investigation, affirm, set aside, or modify the order of such collector. If any reputable citizen of the United States furnishes sworn information to any collector of customs that any vessel, subject to this section, is violating any of the provisions of this section or of the regulations established hereunder, and such information is knowingly false, the person so falsely swearing shall be deemed guilty of perjury.

Violation of section or regulations; penalty; liability of vessel

(14) Whoever shall knowingly violate any of the provisions of this section or of any regulations established under this section shall be subject to a penalty of not more than $2,000 for each violation. In the case of any such violation on the part of the owner, charterer, agent, master, or person in charge of the vessel, such vessel shall be liable for the penalty and may be seized and proceeded against by way of libel in the district court of the United States in any district in which such vessel may be found.

Same; increased penalty in event of personal injury or death

(15) When the death or bodily injury of any person results from the violation of this section or any regulations made in pursuance thereof, the person or persons who shall have knowingly violated or caused to be vio-

lated such provisions or regulations shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

* * * R. S. § 4472; Feb. 27, 1877, c. 69, § 1, 19 Stat. 252; Feb. 20, 1901, c. 386, 31 Stat. 799; Feb. 18, 1905, c. 586, 33 Stat. 720; Mar. 3, 1905, c. 1457, § 8, 33 Stat. 1031; May 28, 1906, c. 2565, 34 Stat. 204; Jan. 24, 1913, c. 10, 37 Stat. 650; Mar. 4, 1913, c. 141, § 1, 37 Stat. 736; Oct. 22, 1914, c. 336, 38 Stat. 766; Mar. 29, 1918, c. 30, 40 Stat. 499; Mar. 2, 1925, c. 387, 43 Stat. 1093; Oct. 9, 1940, c. 777, § 1, 54 Stat. 1023; Proc. No. 2695, July 4, 1946, 11 F.R. 7517, 60 Stat. 1352; 1946 Reorg. Plan No. 3, §§ 101-104, eff. July 16, 1946, 11 F.R. 7875, 60 Stat. 1097; July 16, 1952, c. 887, 66 Stat. 730.

APPENDIX IV

LAWS OF WASHINGTON RE JURY TRIAL AND WAIVER[4]

4.44.100 Jury trial—Fee—Waiver. In all civil actions triable by a jury in the superior court any party to the action may, at or prior to the time the case is called to be set for trial, serve upon the opposite party or his attorney, and file with the clerk of the court a statement of himself, or attorney, that he elects to have such case tried by jury. At the time of filing such statement such party shall also deposit with the clerk of the court twelve dollars, which deposit, in the event that the case is settled out of court prior to the time that such case is called to be heard upon trial, shall be returned to such party by such clerk. Unless such statement is filed and such deposit made, the parties shall be deemed to have waived trial by jury, and consented to a trial by the court: *Provided,* That, in the superior courts of counties of the first class such parties shall serve and file such statement, in manner herein provided, at any time not later than two days before the time the case is called to be set for trial. [1909 c 205 § 1; 1903 c 43 § 1; RRS § 316. FORMER PARTS OF SECTION: Code 1881 § 248 now in RCW 4.48.010.]

[4] From Revised Code of Washington.

APPENDIX V

Record References to Possibly Challenged Findings of Fact

"II.

"Identity of Parties and Amounts Involved.

"A. Each plaintiff is a resident and citizen of either the State of Washington or of the State of California. The named plaintiffs (except The Bank of California, N. A., which held a ship mortgage) were partners doing business in the State of Washington under the assumed business name of 'Pacific Queen Fisheries' and owned and operated the D/V PACIFIC QUEEN. The other persons, George Hull, William Peck and O. E. Royer, designated in No. 2543 as 'additional parties at the instance of the Court,' and in No. 2348 as 'additional plaintiffs,' are residents and citizens of the State of Washington and *each of them had acquired interests in 'Pacific Queen Fisheries'* from John Breskovich, one of the named plaintiffs, when he sold portions of his interest to them in 1951-53 (Exs. 369 ff).[1]"

[1] R. 331, 333, 334, 337, 1519-1522, 1619-1620; Exs. 369-370, 372-377 (PQF federal income tax returns), and Exs. 379-381 (letters), all of which were designated but not printed.

"III.

"Trial to the Court.[1]

"Trial was to the Court. A jury trial was tardily asked in No. 2543, but was held to have been waived because the demand was not timely[2]. *No. jury trial was demanded in No. 2348*[3]. At plaintiffs' request the two cases were consolidated for trial[4]."

[1] Finding III was not challenged by PQF's Specification of Points (R. 297 a-h).

[2] R. 95ff at 108, 108ff at 110, 169, 298ff at 312, 224ff.

[3] R. 51-52.

[4] R. 46-50.

"VI.

"Loss by Gasoline Explosion.

"The PACIFIC QUEEN became a total constructive loss on September 17, 1957, because of a violent *gasoline* explosion.[1] One of two crew members quartered aboard the vessel lost his life[2]. The other escaped and was one of the principal witnesses at the subsequent Coast Guard hearing described below[3]."

[1] R. 513-516, 643-668 (background), 669-683, 751-757, 824-839, 853-858, 1029-1036, 1047-1050, 1051-1085, 1088-1091, 1277-1278, 1301-1302, 1303-1304.
[2] R. 1069, 1081.
[3] R. 1115-1121.

"IX.

"B. *But any evidence of this is incredible.* As recently as June, 1960, at a pre-trial deposition, plaintiffs' counsel stipulated that any such alterations in gas tank facilities were made some time *after* the end of the 1955 season and *before* the beginning of the 1957 season[1]. The 1957 season did not begin until May 24, 1957, when 8,000 gallons of gasoline were loaded aboard before the PACIFIC QUEEN sailed to Alaska. *In other respects plaintiffs' evidence on this matter was conflicting and obscure[2]. It is impossible to fix the exact date of these changes because the owners failed to come forward with any information until very late, and the information then offered was exceedingly vague and unsatisfactory."*

[1] R. 1346-1347.
[2] R. 988-989, 1246-1247, 1331, 1334-1336, 1339, 1501-1502, 1611-1612, 1620.

"IX.

"C. *Based upon all of the evidence, the Court finds that, at some date subsequent to the 1955 survey, and prior to the attachment date of the insurances on May 24, 1957, the plaintiff owners and managers of the vessel had increased the*

gasoline-carrying capacity of the PACIFIC QUEEN *from approximately 3,000 gallons to 8,000 gallons*[1]. This alone was a material increase in the risk *which was not disclosed to the Underwriters*[2]."

[1] R. 1246, 1346-1347, 1611-1612.
[2] R. 770-776, 779-782, 940, 944-945, 947-949, 1356, 1363. 1444-1448.

"IX.

"D. An even greater *undisclosed* increase in the risk was accomplished at that same time by making the following extremely hazardous alterations in the method of discharging gasoline[1]. Plaintiffs inserted interior below-deck exposed gasoline-discharge valves into fittings that had been designated and used for insertion of permanently secured drainage plugs[2]. These valve replacements were located in or near a passageway where ship's equipment, fishing gear and personnel frequently passed[3]."

[1] R. 772-776, 947-948, 1269-1270, 1356, 1376-1377, 1486-1487, 1675-1680.
[2] R. 1124-1125, 1405-1406, 1420-1421, 1486-1487, 1569-1573, 1583-1584, 1586-1587, 1612.
[3] R. 1144-1147, 1405-1406, Ex. 201 (model).

"X.

"Plaintiffs failed to Disclose these Material Increases in the Risk to Hansen & Rowland or to Defendants.

"A. Plaintiff August Mardesich *was the Manager* of the PACIFIC QUEEN in 1957. He was not quartered or employed aboard the vessel in any capacity[1]. He had personal knowledge of the gasoline tank and discharge changes which rendered the vessel extremely hazardous[2] and which materially increased the risk[3]. Neither he nor any of the other partners disclosed these changed conditions to the Underwriters[4]."

[1] R. 325, 337, 976, 982-983, 994, 1314-1316, 1334, 1501, 1582-1583, 1596.
[2] R. 1420-1421, 1569-1571, 1608-1612.
[3] R. 1124-1125, 1405-1406, 1420-1421, 1486-1487, 1569-1573, 1583-1584, 1586-1587, 1608-1612.
[4] R. 770-776, 779-782, 940, 944-945, 947-949, 1356, 1363, 1444-1448.

"X.

"B. *The increased gasoline capacity and the hazardous modifications of the discharge system were not made at a time or under circumstances such as to bring them to either the actual or the constructive notice of the Underwriters.*[1]"

[1] Finding IX B on the circumstances of the modifications is not challenged directly or implicitly; R. 779-782, 919-937, 988-989, 1192, 1198-1208, 1246, 1330-1331, 1334-1339, 1346-1347, 1501-1502, 1537-1538, 1561-1565, 1611-1612, 1620, 1627-1630; Exs. 16, 17, 363.

"X.

"D. Neither Marquat, now deceased, who made an insurance survey in 1955, nor Elkins, since retired, who made the survey in 1957, knew of the increased gasoline capacity or of the unsafe and improper gasoline-discharge facilities at the time of their respective surveys[1], *and there was nothing observable by any reasonable inspection which would have disclosed the changes.*"

[1] Findings IX A and IX B on the date of the modifications are not challenged directly or implicitly, so Marquat, who surveyed the vessel before they were made, could not have known of them; as to Elkins, see Ex. 17 and R. 1192, 1198-1208, 1537-1538, 1561-1565.

"X.

"J. Each of the changes constituted a material increase in the risk *which was concealed from and not disclosed to defendants*[1]."

[1] R. 770-776, 779-782, 787, 830-833, 844-846, 919-937, 940, 944-945, 947-949, 988-989, 1124-1125, 1144-1145, 1192, 1198-1208, 1246, 1269-1270, 1330-1331, 1334-1339, 1346-1347, 1356, 1363, 1376-1377, 1405-1406, 1420-1421, 1444-1448, 1501-1502, 1537-1538, 1561-1565, 1569-1573, 1578-1579, 1583-1584, 1586-1587, 1594-1596, 1611-1613, 1617-1619, 1627-1630, 1656-1658, 1683-1684, 1689.

"XI.

"*The* PACIFIC QUEEN *was repeatedly sent to Sea in an Unseaworthy State with the Privity of the Owners.*

"A. *The* PACIFIC QUEEN *was unseaworthy each time she was sent to sea on and after May 24, 1957.* The PACIFIC QUEEN

was unseaworthy when she left for her 1957 voyage by reason of the hazardous condition caused by the increased gasoline-carrying capacity and, to an even greater extent, by reason of the changed method of piping, valving and internal methods of discharge of gasoline. This system was grossly unsafe and improper, and created a great and serious hazard to life and property[1]. The owners were privy to this unseaworthiness, and knew of these conditions and neglected to take reasonable precaution to correct these deficiencies and to make her seaworthy[2]."

[1] R. 772-776, 830-833, 844-846, 925, 1047-1050, 1269-1270, 1569-1573, 1583-1584, 1586-1587, 1594-1596, 1656-1658, 1677-1680.

[2] R. 554, 982-983, 987-992, 994, 1150-1151, 1246, 1336-1339, 1537-1538, 1564-1567, 1608-1613, 1617-1620.

"XI.

"B. After the PACIFIC QUEEN returned from Alaska, she shifted to various Puget Sound docks and was then sent *to sea* from Seattle to Friday Harbor, Washington. The hazardous gasoline condition remained uncorrected, and she was still in an unseaworthy state with privity and knowledge of her owners, and of her manager.[1]"

[1] R. 571-574, 845-846, 994, 1009, 1127-1128, 1425-1428, 1543-1546, 1617-1620; Ex. 438—designated but not printed.

"XI.

"E. The vessel was sent *to sea with the privity of the owners and managers* in an unseaworthy condition from Friday Harbor to Seattle where she remained a few days exposed to the same hazards and tied up at an oil dock where great hazard to life and property was continuously threatened.[1] She then was again sent to sea from Seattle to Tacoma under the same extremely hazardous condition.[2]"

[1] R. 977-982, 996-997, 1167-1170, 1426-1427, 1558-1560, 1688.

[2] R. 1167-1170, 1427-1428.

"XI.

"F. By reason of the continuing hazardous and unsafe

method of discharging gasoline and by reason of the failure properly to clean up after the Friday Harbor spill, the PACIFIC QUEEN was again sent *to sea* in an unseaworthy condition when she left Seattle for Tacoma two days prior to her explosion and loss.[1]''

[1] R. 1167-1170, 1427-1428.

''XI.

''G. The day after her arrival at Tacoma, while still in such perilous and unseaworthy condition *with the privity and knowledge of her assured owners and managers,* she exploded and became a constructive total loss with loss of life and destruction of property.[1] Her continuous unseaworthiness until her fatal explosion was a proximate cause of her loss.''

[1] R. 199, 554, 571-574, 772-776, 830-833, 844-846, 925, 977-983, 987-992, 994, 996-997, 1009, 1047-1085, 1088-1091, 1127-1128, 1150-1151, 1167-1170, 1246, 1269-1270, 1336-1339, 1425-1428, 1537-1538, 1543-1546, 1558-1560, 1564-1567, 1569-1573, 1583-1584, 1586-1587, 1594-1596, 1608-1613, 1617-1620, 1656-1658, 1677-1680, 1688.

''XII.

''*The Destruction of the* PACIFIC QUEEN *was Caused by a Gasoline Explosion.*

''A. *Based on the overwhelming preponderance of the evidence,* the constructive total loss of the PACIFIC QUEEN was the result of a *gasoline* explosion. *There is no credible or reasonable direct evidence or inference from the evidence to the contrary. The explosion was of gasoline and gasoline vapors from the prior spill into the interior of the vessel at Friday Harbor. The fire which followed the destructive explosion was primarily of this gasoline and gasoline vapors feeding on the wooden members of the then shattered hulk of the* PACIFIC QUEEN *as she was sinking to the shallow bottom. But the explosion had already caused such extensive wreckage as to render her a constructive total loss irrespective of the subsequent gasoline flames touched off by the ex-*

plosion which engulfed the wrecked vessel and though intense were soon extinguished.[1]''

[1] R. 513-516, 669-683, 751-757, 824-839, 853-858, 1029-1036, 1051-1085, 1088-1091, 1277-1278, 1301-1304, 1487-1488.

''XII.

''B. *There is no credible evidence of arson.*[1] *The Tacoma Fire Department, the Tacoma Police Department,* and the United States Coast Guard *all* made extensive investigations and none found any basis for such a conclusion. *No further evidence whatsoever as to arson or other wrongful acts by third persons was adduced in the extensive pre-trial depositions, or at trial; and the Court finds there is no basis in fact for any such contentions. The explosion was due to accumulated gas vapors that created a most perilous condition, and to accidental ignition possibly by the deceased crew member or some other chance spark.''*

[1] R. 1027-1030, 1078-1079, 1268-1269, 1302, 1489-1490.

''XII.

''C. *There was no pre-existing fire in the* Paqific Queen *preceding the explosion.*[1] *The gasoline explosion was the proximate cause of the constructive total loss of the vessel.*[2] *The source of ignition is unknown. It could have been a spark from a cigarette, or a match, or an electric contact, or other accidental source; but the explosion resulted from a want of due diligence by the assured owners and managers to remedy the extremely hazardous conditions which existed from the time of the gasoline spill.*[3]''

[1] R. 675-676, 820-830, 857-858, 1491; trial court viewed the vessel.
[2] R. 513-516, 669-683, 751-757, 824-839, 853-858, 1029-1036, 1051-1085, 1088-1091, 1277-1278, 1301-1304, 1487-1488.
[3] R. 857, 1027-1030, 1082, 1090-1091, 1302.

''XII.

''D. *The possibility that it was an ammonia explosion is, at the very best, not any more than remote and unlikely*

speculation.[1] Captain Buckler's testimony to the effect that he now believes the explosion to have been of ammonia origin was arrived at shortly before trial in conference with plaintiff's counsel, and without his being in possession of any additional facts other than those on which, a few months earlier, he had based his prior written survey opinion that the cause of the explosion was unknown.[2] Plaintiffs' expert witness, Mr. Sax, based his opinion that the explosion was of ammonia origin on an inadequate examination of the vessel and on assumed facts which were not supported by the evidence.[3]''

[1] R. 675-680, 699-702, 744-745, 751-753, 758-759, 1277, 1305.
[2] R. 401-406.
[3] R. 490-496, 506-507, 512-516, 520-522, 805.

''XII.

''E. Testimony, introduced by the plaintiffs, of witnesses living within a few hundred feet of the explosion, who were immediately awakened and could observe its inception, reported a ball of orange fire and of black smoke at the time of the explosion.[1] Such a characteristic is consistent only with an explosion of gasoline vapor origin. *It is not consistent with one of ammonia origin.* Plaintiffs' expert, Mr. Sax, also concedes this fact.[2] *The ammonia odor at the scene of the catastrophe was from ammonia remnants in a refrigeration system that had previously been completely pumped down.*[3] The odor is very noxious and can arise from small traces or quantities.[4]''

[1] R. 1094-1101, 1163-1166.
[2] R. 512-516, 521, 759-761.
[3] R. 744.
[4] R. 506-507, 755-756.

''XII.

''F. Moreover, and more importantly, the theory of an ammonia explosion is based entirely upon the additional hypothesis that a severe fire existed in the engine room prior to the explosion. *The Court's personal examination*

aboard the hulk of the PACIFIC QUEEN *and the photographs in evidence show, beyond the slightest question, that no fire existed in the engine room prior to the time that the forward bulkhead in the engine room was blown off its flanges. This occurred at the time of the explosion. The char in the engine room and behind the flanges is easily explicable by the fury of the fire after the explosion. This is illustrated by the photographs taken by Mr. Kollar.*[1]''

[1] R. 675-676, 820-830, 857-858.

''XII

''H. *The peculiar internal system of ventilation and the path of air on the* PACIFIC QUEEN, *unaided by mechanical ventilation, so graphically illustrated at the time of the Friday Harbor spill, resulted in the presence in the upper port forward engine room of an explosive mixture of gasoline vapors with air at the time of the explosion which mixture was the explosive agent and cause of the loss of the* PACIFIC QUEEN.[1]''

[1] R. 707-713, 715-726, 728-729, 742-743, 836-840.

''XIII.

''*The Owners and Manager of the* PACIFIC QUEEN *Did Not Use Due Diligence to Prevent the Loss of the* PACIFIC QUEEN *by Explosion.*

''A. Some of the owners and the manager of the PACIFIC QUEEN, Mardesich, were privy to, and had thorough knowledge of the dangerous conditions aboard the PACIFIC QUEEN from the time 8,000 gallons of gasoline were loaded in May, 1957, to the date of the explosion on September 17, 1957. The owners and the manager, Mardesich, failed to use due diligence and were grossly negligent in preventing the loss of the PACIFIC QUEEN by explosion in at least two respects:

''1. First, as outlined above, at some time between 1955 and May 24, 1957, they were privy to and knew they had converted the gasoline discharge facilities of the PACIFIC

QUEEN in such fashion as they became totally improper and unsafe.[1] This improper and unsafe system was a proximate cause of the explosion and resultant destruction of the vessel.[2]

"2. Second, the owners and manager of the PACIFIC QUEEN *were privy to the Friday Harbor spill and failed to use due diligence and were grossly negligent* in the steps taken towards cleaning up the results of the Friday Harbor gasoline spill and to purge the vessel and its structures of gasoline and gasoline vapors, all with the actual knowledge and acquiescence and direction of owner *and manager Mardesich, as well as of owner,* superintendent and chief engineer Jasprica.[3]"

[1] Findings IX A and IX B on the modifications are not challenged directly or implicitly. Nor is either of the findings denominated IX D. Since appellants caused the modifications, they were privy to them.

[2] Findings XI C and XI D on the Friday Harbor spill are not challenged directly or implicitly; R. 199, 513-516, 554, 571-574, 669-683, 751-757, 772-776, 824-839, 844-846, 853-858, 925, 977-983, 987-992, 994, 996-997, 1009, 1029-1036, 1047-1085, 1088-1091, 1127-1128, 1150-1151, 1167-1170, 1246, 1269-1270, 1301-1304, 1336-1339, 1425-1428, 1487-1488, 1537-1538, 1543-1546, 1558-1560, 1564-1567, 1569-1573, 1583-1584, 1586-1587, 1594-1596, 1608-1613, 1617-1620, 1656-1658, 1677-1680, 1688.

[3] Finding XI C on the Friday Harbor spill is not challenged directly or indirectly; R. 199, 554, 571-574, 772-776, 830-833, 844-846, 925, 977-983, 987-992, 994, 996-997, 1009, 1047-1085, 1088-1091, 1122, 1127-1128, 1150-1151, 1153, 1167-1170, 1241-1242, 1246, 1269-1270, 1336-1339, 1425-1428, 1529-1531, 1537-1538, 1543-1546, 1558-1560, 1564-1567, 1569- 1573, 1583-1584, 1586-1587, 1594-1596, 1608-1613, 1617-1620, 1656-1658, 1677-1680, 1688.

"XIII.

"B. The *manager,* Mr. Mardesich, *was especially privy to all of these conditions.* He knew of the alterations of the tanks[1]; of the loading of 8,000 gallons of gasoline [2]; of the extreme hazard of exposed interior valves; and of the serious gasoline spill at Friday Harbor [3]; and he personally inspected the vessel at that time, *but he failed to exercise due diligence to purge her of gasoline and fumes,* or to remove the remaining bulk gasoline, or to make any gas-

free tests, or to secure and plug the drain-valves in the other tanks.[4] Considering the serious nature of the spill, the measures taken by the owners and manager to purge the PACIFIC QUEEN of gasoline and gasoline vapors were not adequate in the exercise of due diligence.[5]''

[1] R. 989-995, 1124-1125, 1405-1406, 1420-1421, 1486-1487, 1569-1573, 1583-1584, 1586-1587, 1608-1612.

[2] R. 1501, 1582-1583.

[3] Finding XI C on the Friday Harbor spill is not challenged directly or implicitly.

[4] Finding XI C on the Friday Harbor spill is not challenged directly or implicitly.

[5] Finding XI C on the Friday Harbor spill is not challenged directly or implicitly.

''XIII.

''C. *The subsequent explosion and destruction of the* PACIFIC QUEEN *were proximately caused by these failures by the owner or manager to use due diligence.*[1] *This failure to use due diligence was with the privity and knowledge of the owners, and of the manager, Mardesich.* He was fully informed but treated the hazardous loading, stowage, and subsequent large spill of gasoline with such a casual indifference *as to amount to gross negligence and an extraordinary want of due diligence.''*

[1] Finding XI C on the Friday Harbor spill is not challenged directly or implicitly; R. 199, 513-516, 554, 571-574, 669-683, 751-757, 772-776, 1036, 1047-1085, 1088-1091, 1127-1128, 1150-1151, 1167-1170, 1246, 824-839, 844-846, 853-858, 925, 977-983, 987-992, 994, 996-997, 1009, 1029, 1036, 1047-1085, 1088-1091, 1127-1128, 1150-1151, 1167-1170, 1246, 1269-1270, 1277-1278, 1301-1304, 1336-1339, 1425-1428, 1487-1488, 1537-1538, 1543-1546, 1558-1560, 1564-1567, 1569-1573, 1583-1584, 1586-1587, 1594-1596, 1608-1613, 1617-1620, 1656-1658, 1677-1680, 1688.

''XV.

''*The* PACIFIC QUEEN *was in Continuing Violation of the Tanker Act Through the Fishing Season of 1957.*

''A. In 1957 gasoline was carried as cargo. It was sold to some independent fishermen.[1] It was one of the conces-

sions given to other independent fishermen to get them to fish for the PACIFIC QUEEN.[1] More than 4% of the 8,000 gallons of gasoline carried to Alaska was sold to independent fishermen Pearson and Vistad. This amount constituted more than 6% of the number of gallons of gasoline actually used in the 1957 fshing season by the PACIFIC QUEEN.[1]''

[1] R. 1421-1423, 1507-1516, 1518-1519, 1532-1534, 1596.

"XVIII.

"A gasoline explosion by accidental source was reasonably foreseeable.

"A gasoline explosion such as that which happened was reasonably foreseeable in the exercise of due diligence by the owners and managers of the PACIFIC QUEEN. *The vessel permeated with gasoline fumes was a 'floating time bomb' which would explode by a spark from any source.* She lay at a public dock frequented by ships' personnel, fishermen, sightseers, and visitors. In the summertime, is 'loaded' with people 'who go for recreation' and 'plenty of lovers sometimes go to park' (Ex. 233, Nevens, pp. 12-13). With knowledge that this vessel was *permeated with gasoline fumes,* and in a frequented public place, the owners and manager took no steps to provide a watchman or warn crew members not to smoke or light matches, etc. *The explosion was reasonably foreseeable in the exercise of ordinary care or reasonable diligence.''*[1]

[1] This is a summary of numerous preceding findings and is supported by the evidence cited for Findings XI, E-G, XII A, C, and XIII and by Finding XI C on the Friday Harbor spill, which was not challenged directly or indirectly.

APPENDIX VI

TABLE OF EXHIBITS

"R" references are to printed Record; "TP" references are to the original typed Transcript of Proceedings where relevant material is not in printed Record.

Exhibit Number					
Pl.	*Def.*	*Identified*	*Offered*	*Received in Evidence*	*Rejected*
2		TP 40	TP 40	TP 40	
3		"	"	"	
4		"	"	"	
5		"	"	"	
6		R 348	R 348	R 351	
7		"	"	"	
8		"	"	"	
9		"	"	"	
10		"	"	"	
11		"	"	"	
12		"	"	"	
13		"	"	"	
14		"	"	"	
15		"	"	"	
16		"	"	"	
17		"	"	"	
18		"	"	"	
19		"	"	"	
20		"	"	"	
21		"	"	"	
22		"	"	"	
23		"	"	"	
24		"	"	"	
25		"	"	"	
26		"	"	"	
27		R 348	R 348	R 351	
28		"	"	"	
29		"	"	"	
30		"	"	"	
31		"	"	"	
32		"	"	"	
33		"	"	"	

Exhibit Number Pl.	Def.	Identified	Offered	Received in Evidence	Rejected
34		R 348	R 348	R 351	
35		"	"	"	
36		"	"	"	
37		"	"	"	
38		"	"	"	
39		"	"	"	
40		"	"	"	
41		"	"	"	
42		"	"	"	
43		"	"	"	
44		R 349	R 349	"	
45		"	"	"	
46		"	"	"	
46-1		TP 444	TP 444	TP 444	
49		R 348	R 348	R 351	
52		"	"	"	
55		"	"	"	
58		TP 40	TP 40	TP 40	
76		R 386	TP 170	TP 170	
77A		TP 300-301	TP 303	TP 303	
77B		TP 301-303	"	"	
77C-F		TP 303	"	"	
77G		TP 310	TP 310	TP 311	
	77A1	TP 695-696	TP 698	TP 698	
80		TP 524			
81		R 781	R 782	R 782	
82		TP 1075	TP 1076	TP 1080	
87		R 963	R 963	R 963	
	201	R 357	R 357	R 357-358	
	202	"	"	"	
	203	"	"	"	
	204	R 649	R 649	R 649-650	
	204	R 357	R 357	R 357-358	
	205	"	"	"	
	213	TP 705	TP 705	TP 705	
	214	TP 1094	TP 1094	TP 1097	
	215	"	"	"	
	216	"	"	"	

Exhibit Number Pl.	Def.	Identified	Offered	Received in Evidence	Rejected
	217	TP 1094	TP 1094	TP 1095	
	218	"	"	"	
	219	"	"	"	
	236	TP 1097	TP 1097		TP 1097
	237	R 518	R 519	R 519	
	238	R 470-471	R 471	R 471	
	238-1	TP 433	TP 433	TP 434	
	239	R 518	R 519	R 519	
	240	TP 441	TP 441-442	TP 442	
	241	TP 1182	TP 1180	TP 1187	
	242	"	"	"	
	243	"	"	"	
	244	"	"	"	
	245	TP 1183	"	"	
	246	"	"	"	
	247	"	"	"	
	248	"	"	"	
	249	"	"	"	
	250	"	"	"	
	251	"	"	"	
	252	"	"	"	
	253	"	"	"	
	254	"	"	"	
	255	TP 1188	"	TP 1188	
	256	TP 1189	"	TP 1189	
	257	"	"	"	
	258	"	"	"	
	259	"	"	"	
	260	"	"	"	
	261	"	"	"	
	262	"	"	"	
	263	TP 1189	TP 1180	TP 1189	
	264	TP 1180	TP 1180	TP 1180	
	265	TP 1098	TP 1098	TP 1099	
	266	"	"	"	
	267	"	"	"	
	268	"	"	"	
	269	"	"	"	

Exhibit Number Pl.	Def.	Identified	Offered	Received in Evidence	Rejected
	270	TP 1098	TP 1098	TP 1099	
	271	TP 1086	TP 1086	TP 1087	
	274	TP 1099	TP 1099	TP 1099-1100	
	275	"	"	"	
	277	"	TP 1100-1101	TP 1101	
	278	"	TP 1100	"	
	279	"	TP 1101	"	
	280	"	"	"	
	281	R 880	R 883-884	R 885	
	287	TP 1191-1192	TP 1191-1192		TP 1192
	288	"	"		"
	289	"	"		"
	290	"	"		"
	291	"	"		"
	292	"	"		"
	293	"	"		"
	294	"	"		"
	294-1	TP 1193	TP 1193		TP 1193
	295	TP 1193-1194	TP 1193-1194	TP 1194	
	296	"	"	"	
	297	"	"	"	
	298	"	"	"	
	299	"	"	"	
	300	"	"	"	
	301	"	"	"	
	302	"	"	"	
	302-B	R 961	TP 1435	TP 1436	
	303	TP 1193-1194	TP 1193-1194	TP 1194	
	304	"	"	"	
	305	"	"	"	
	306	"	"	"	
	307	"	"	"	
	308	"	"	"	
	309	"	"	"	
	310	"	"	"	
	311	"	"	"	
	312	"	"	"	

Exhibit Number Pl.	Def.	Identified	Offered	Received in Evidence	Rejected
	313	TP 1193-1194	TP 1193-1194	TP 1194	
	314	"	"	"	
	315	TP 1194-1195	TP 1194-1195		TP 1195
	316	TP 1196	TP 1195	TP 1196-1197	
	317	"	"	"	
	318	"	"	"	
	319	TP 1196	TP 1195	TP 1196-1197	
	320	"	"	"	
	321	"	"	"	
	322	TP 1195-1196	TP 1195	TP 1196	
	323	TP 1413	TP 1413	TP 1413-1414	
	324	"	"	"	
	325	"	"	"	
	326	"	"	"	
	327	"	"	TP 1415	
	328	TP 1414	TP 1414	"	
	329	"	"	"	
	330	"	TP 1414-1415	"	
	331	"	TP 1415		Not admitted—TP 1415
	332	TP 1416	TP 1416	TP 1416	
	333	"	"	"	
	334	"	"	"	
	335	"	"	TP 1417	
	336	TP 1417	TP 1417	"	
	337	"	"	TP 1417-1418	
	338	TP 1418	TP 1418	TP 1418	
	339	"	"	"	
	340	"	"	"	
	341	"	"	"	
	342	"	"	"	
	343	"	"	"	
	353	TP 791	TP 791	TP 792	
	358	"	TP 792	"	
	361	"	"	"	
	361A	TP 793	TP 793	TP 793	
	363	TP 1354	TP 1354	TP 1354	

Exhibit Number Pl.	Def.	Identified	Offered	Received in Evidence	Rejected
	363A	TP 1102-1103	TP 1102-1103	TP 1103	
	365	TP 1103	TP 1103	TP 1104	
	366	"	"	"	
	367	"	"	"	
	368	"	"	"	
	369	R 332	R 338	R 338-339	
	370	R 332-333	"	"	
	371	R 333	"	"	
	372	"	"	"	
	373	R 334	"	"	
	374	"	"	"	
	375	R 335	"	"	
	376	R 336-337	"	"	
	377	R 338	"	"	
	377-1	TP 1104	TP 1104	TP 1104-1105	
	378	TP 1105	TP 1105	TP 1105	
	379	"	"	"	
	380	"	"	"	
	381	"	"	"	
	382	TP 1107-1108	TP 1107-1108	TP 1108	
	383	TP 1105-1106	TP 1105	TP 1106	
	384	"	"	"	
	385	"	"	"	
	386	"	"	"	
	387	TP 1106	"	TP 1107	
	388	TP 1107	"	"	
	389	"	"	"	
	390	R 607	R 607	R 610	
	391	"	"	"	
	392	"	"	"	
	393	"	"	"	
	394	"	"	"	
	395	"	"	"	
	397	"	"	"	
	398	"	"	"	
	399	"	"	"	
	400	R 608	R 608	"	
	401	"	"	"	

Exhibit Number Pl.	Def.	Identified	Offered	Received in Evidence	Rejected
	402	R 608	R 608	R 610	
	403	"	"	"	
	405	"	"	"	
	406	R 609	R 609	"	
	407	"	"	"	
	408	"	"	"	
	409	"	"	"	
410		R 610	R 610	R 610	
	411	TP 1090	TP 1090		TP 1092
	412	"	"		"
	413	"	"		"
	414	"	"		"
	415	"	"		"
	416	"	"		"
	417	"	"		"
	418	"	"		"
	419	"	"		"
	420	"	"		"
	421	TP 1092	TP 1092		"
	422	"	"		"
	423	"	"		"
	424	"	"		"
	425	"	"		"
	426	"	"		"
	427	"	"		"
	428	"	"		"
	429	"	"		"
	430	"	"		"
	431	"	"		"
	432	"	"		"
	433	"	"		"
	434	"	"		"
	435	TP 1092	TP 1092		TP 1092
	436	"	"		"
	437	R 453	R 453	R 453	
	438	R 581	R 582	R 583	
	439-1	TP 625	TP 626	TP 626	
	440	R 1004	R 1004		TP 1508
	441	R 998	"	R 1005	
	441A	R 998, 1005	"	"	

Exhibit Number					
Pl.	*Def.*	*Identified*	*Offered*	*Received in Evidence*	*Rejected*
	444	TP 696	TP 698	TP 698	
	444 1-3	TP 697-698	"	TP 698	
	445	R 609	R 609	R 610	
	446	"	"	"	
	447	TP 845	TP 845	TP 845	
	448	TP 909	TP 909	TP 910	
	449	TP 975-976	TP 976	TP 976	
	450	"	"	"	
	451	R 822	R 823	R 823	
	452A-F	R 824-825	R 825	R 825	
	453	R 882-883	R 883	R 884	
	454	TP 1294	TP 1294	TP 1295	
	454 1-3	R 896-897	TP 1293	TP 1294	
	455	TP 1305-1306	TP 1306	TP 1306	
	456	R 904	TP 1321	TP 1321	
	457	TP 1386	TP 1386	TP 1386	

No. 17461 and No. 17460

United States Court of Appeals
For the Ninth Circuit

No. 17461 (formerly USDC WD Wash. No. 2543)

PACIFIC QUEEN FISHERIES, a partnership, (AUGUST P. MARDESICH, MIKE BAROVIC, JOHN BRESKOVICH, NICK JASPRICA, * * * JOHN K. VILICICH, *et al.*), d/b/a PACIFIC QUEEN FISHERIES, *Plaintiffs-Appellants,*

vs.

ATLAS ASSURANCE COMPANY, COMMERCIAL UNION INSURANCE COMPANY, GREAT AMERICAN INSURANCE COMPANY, GLENS FALLS INSURANCE COMPANY, BUFFALO INSURANCE COMPANY, UTAH HOME FIRE INSURANCE COMPANY, and COMMONWEALTH INSURANCE COMPANY, *Defendants-Appellees,*

and

GEORGE HULL, WILLIAM PECK and O. E. ROYER, *Additional Parties at the Instance of the Court,*

No. 17460 (formerly USDC WD Wash. No. 2348)

(consolidated for trial with No. 2543)

PACIFIC QUEEN FISHERIES, a partnership, (AUGUST P. MARDESICH, MIKE BAROVIC, JOHN BRESKOVICH, NICK JASPRICA, * * * JOHN K. VILICICH, *et al.*), d/b/a PACIFIC QUEEN FISHERIES, *Plaintiffs-Appellants,*

and

GEORGE HULL, WILLIAM PECK and O. E. ROYER, *Additional Plaintiffs,*

vs.

L. SYMES, *et al.* (UNDERWRITERS AT LLOYDS and CO-INSURING COMPANIES at LONDON), *Defendants-Appellees.*

SUPPLEMENT TO APPENDIX V OF DEFENDANTS'-APPELLEES' (UNDERWRITERS') ANSWERING BRIEF

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May 8, 1962

THE ARGUS PRESS, SEATTLE, WASHINGTON

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SUPPLEMENT TO APPENDIX V

1. Reason for Supplement

Underwriters' Answering Brief dated April 6, 1962, set forth in Appendix V, pp. 29A-40A, certain "Record Reference to *Possibly* challenged Findings of Fact" because PQF in their Opening Brief had not designated which Findings of Fact they claimed to be erroneous. See Underwriters' Answering Brief, pp. 4, 24-25, 30-31, 32-34, and 29A-40A.

PQF's Reply Brief now undertakes to designate those Findings of Fact which it challenges. See PQF's Reply Brief, p. 20; and their Appendix I, pp. 23-32.

An examination of PQF's Appendix I reveals that Underwriters had supplied record references in Appendix V of their Answering Brief to all possibly challenged Findings of Fact except the following which Underwriters did not then believe were challenged:

Finding X(E). See PQF's Reply Brief, p. 24, line 9.

Finding XI(C). See PQF's Reply Brief, p. 25, line 2.

Finding XII(G). See PQF's Reply Brief, p. 25, line 18.[1]

Accordingly, these three Findings are documented below, underscoring apparently challenged portions and furnishing record references to so much of the Transcript of Proceedings as was designated for printing, in exactly the same manner as in Appendix V of Underwriters' Answering Brief.

[1]This is the only subsection of Finding XII not annotated in Underwriters' Appendix V, but it may now be challenged by PQF's broad reference to Finding XII under Point 11 at p. 25 of their Reply Brief.

2. Record References to Further Challenged Findings of Fact

"X.

"E. At the time of the surveys by Marquat *and Elkins* there was nothing in the situation that was observable, by reasonable inspection, which would have disclosed that the owners and managers had made or intended to make the changes in gasoline capacity or discharge facilities which existed at the time of the loss of the PACIFIC QUEEN.[1] Plaintiffs' counsel now claims, on brief, that, whenever these changes were made, they were a 'simple job that would not take two men 30 minutes' (Pl. Memo on law issues filed pursuant to Court's Oral Decision, Doc. 136, p. 8, line 11)."

[1] R. 989, 1204-1208, 1216, 1537-1538, 1561-1565, 1627-1630; the statement of appellants' counsel, while not designated, is not contested.

"XI.

"C. While she was at Friday Harbor, she still had on board some remaining 2,000 gallons of gasoline. (USCG Report, Ex. 30, p. 4, R. 1060). On September 9, 1957, at Friday Harbor, from 500 to 600 gallons of gasoline were spilled from one of the four tanks in the hold of the PACIFIC QUEEN into the interior of the vessel.[1] Although now minimized and treated as trivial by plaintiffs, this was a catastrophe of major proportions. It created great hazards to the ship, life and property, both then and later. Gasoline from the spill soaked and impregnated large parts of the wooden hull and structure of the vessel.[2] It was not a sudden spill but began early in the evening preceding its discovery at 4 a.m. by the cook.[3] In the course of the spill, liquid gasoline and gasoline fumes permeated the lower after portion of the vessel.[4] The spill was reported to one of the plaintiff owners and the manager of the vessel, August Mardesich, while he was in Friday Harbor on September 9, 1957.[5] He inspected the vessel, but did not give any specific orders as to the methods to be used in cleaning up the vessel; did not order any chemical tests to be made as to whether she was

gas-free, and did not order any plugging-up of the valves on the other gasoline tanks to prevent further similar spills; nor did he order the discharge of the remaining gasoline from the other tanks.[6] *The methods that were taken to purge the vessel of the gasoline were not adequate and did not constitute the exercise of due diligence considering the serious nature of the spill. On this question the testimony of Mr. Kniseley and Mr. Spaulding, both men of extensive practical experience in this field as well as possessed of great theoretical knowledge, is unquestionably correct that the measures taken to clean up the spill were inadequate.*[7] In addition to Mr. Mardesich, Mr. Jasprica, also an owner of the PACIFIC QUEEN, was present at the time of the spill and participated in the *inadequate* clean-up measures.[8] *The vessel was unseaworthy after the Friday Harbor spill for want of full and proper precautions to clean and purge the ship after the spill.* She was also unseaworthy because of the continuing hazard of her altered method of gasoline discharge, and the absence of precaution to prevent further spills resulting; in extremely hazardous below-deck carriage of bulk gasoline. A plug was put into the valve on one of the tanks but no precautions were taken to prevent similar spills from the remaining three tanks.[9] All of the plaintiffs' witnesses, including two of the part-owners, who were experienced in the handling of gasoline, agreed that this was a serious want of due diligence.[10] *All of defendants' witnesses agreed that it was extraordinarily hazardous* to permit a vessel to be in such condition, or *to send the vessel to sea in such condition, and that it might take a period of weeks before the vessel was sufficiently gas-free to operate with safety.*[11]''

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[1] R. 1128-1131, 1144-1145, 1546-1550; Ex. 438 (designated but not printed).

[2] R. 653-661, 685-686, 730-731, 757-758, 816, 836-840, 844-846, 853-857.

[3] R. 554-556, 598, 601, 1128-1129, 1299-1301, 1546-1550, 1578-1579; Ex. 438 (designated but not printed).

[4] R. 559-563, 575, 586-587, 977-980, 1132, 1147-1149, 1392, 1394-1397, 1399, 1429-1430, 1432, 1550-1552, 1555-1558, 1593.

[5] R. 586, 977-982, 995-997, 1553, 1582, 1614, 1617.

[6]R. 586-588, 977-982, 995-997, 1553, 1582, 1614-1617.

[6a]R. 1264-1265.

[7]R. 653-659, 838-840.

[8]R. 556-557, 559-566, 1147-1150, 1553-1558.

[9]R. 1144, 1580-1582.

[10]R. 1586-1587, 1594-1596, 1617-1619.

[11]R. 653-659, 814-817, 838-840, 844-846.

"XII.

"G. *The Court was much more favorably impressed by the testimony of defendants' witnesses, Professor Moulton, Mr. Kniseley and Captain Lees,* not only by reason of their greater scientific qualifications and practical experience and ability in the areas as to which they testified, but also *because they were much more adequately apprised of the true facts of the explosion and fire.*[1]"

[1]R. 611-620, 638-646, 650-662, 669-672, 746-750, 844-851.

Dated at Seattle, Washington, May 8, 1962.

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